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No. 683

In the Supreme Court of the United States

October Term, 1955.

LOUISE McGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased,
Petitioner,

vs.

COMMERCE TRUST COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

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In the Supreme Court of the United States

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LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased,
Petitioner,

vs.

COMMERCE TRUST COMPANY, a Corporation,
Respondent.

No.————

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

Louise McGrew Moffett as an individual and Executrix of the estate of Thomas S. Moffett, deceased, prays that a writ of certiorari issue to review the judgment of Division 1 of the Supreme Court of Missouri entered in the above case on July 11, 1955 (Vol. III, p. 89).

Citations of Opinions Below.

Two opinions of said court are unofficially reported in 283 S. W. (2d) 591-602. The first opinion was delivered on July 11, 1955 (R. 90-104). A second opinion, on motions

for Rehearing, Transfer to Court, *en banc,* and for Stay, (R. 176-179), was delivered on October 11, 1955. Said opinions are printed in Appendix B hereof, *infra,* pages 36 to 52 and 52 to 55.

Jurisdiction.

The judgment of the Supreme Court of Missouri was entered on July 11, 1955 (Vol. III, p. 89). A timely motion for Rehearing and to Transfer to Court, *en banc,* and for Stay, was denied on October 11, 1955 (Vol. III, p. 175) by a second opinion adding and changing the issues and injecting a new Federal question.

A timely second motion for Rehearing and to Transfer to Court, *en banc* (Vol. III, p. 182), necessitated by the second decision of October 11, 1955 (Vol. III, pp. 176-179), filed October 21, 1955, on being seen and fully considered, was by the Court overruled on November 14, 1955 (Vol. III, p. 183).

The filing of the two motions for transfer to the Court, *en banc,* was in compliance with the decision of this Court in *Gorman* v. *Washington University,* 316 U. S. 91, 101.

Jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3). The petition is in Counts I and II. Count II (Vol. I, pp. 53-89), embodied Count I and Exhibit "1" therein (p. 90). Petitioner's action was begun on February 25, 1952 (Vol. I, p. 1), in the circuit court of Jackson County, Missouri, raising Federal question to be reviewed herein.

Federal questions were presented to the trial court in the petition and briefs, and also presented to the Supreme Court of Missouri in said petition and in petitioner's briefs, which court erroneously affirmed the judgment below on the ground the petition failed to state a cause of action (Vol. III, p. 90). And also on the ground that

the judgment of dismissal of the United States District Court at Kansas City on December 1, 1949, was *res judicata,* barring recovery by petitioner in the action in the Missouri state courts, and also by limitations.

Federal questions were also presented in both motions for Rehearing and to Transfer said Cause to the Supreme Court of Missouri, *en banc.*

Said Federal rights, to the surprise of petitioner, were denied by the Supreme Court of Missouri so deciding and in overruling each of said motions after due consideration thereeof. All of which said Federal questions were considered and passed on by the Supreme Court. Each and all of said Federal questions were substantial and important.

Questions Presented.

(1) Whether or not the judgment to be reviewed, deciding that there can be no recovery for loss resulting from overt acts pursuant to the original conspiracy in maintaining the groundless actions after the judgment of dismissal of petitioner's case by the Federal court on December 1, 1949, conflicts with the decision of this Court in *Lawlor* v. *National Screen Service Corporation,* 349 U. S. 322, and presents a Federal question necessitating the issuance of the writ sought.

(2) Whether or not the judgment to be reviewed, deciding that petitioner cannot recover for the loss resulting from the overt acts pursuant to the conspiracy, both before and since the dismissal of petitioner's case by the Federal court on December 1, 1949, on the ground that said judgment of the Federal court is *res judicata* as against petitioner's right to recover on the facts alleged in the petition filed in the State circuit court, conflicts with any or all of the decisions in *Troxell* v.

Delaware, L. & W. Ry. Co., 227 U. S. 434; *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. l. c. 444; and *Ash Sheep Company* v. *United States*, 252 U. S. 159, l. c. 170; *Brooks* v. *Pipe Line*, 77 Fed. (2d) 965 (C. A. 8); *Ivy* v. *United States*, 84 Fed. (2d) 37, l. c. 39 (C. A. 5); *Northern Assurance Co.* v. *Grandview Building Association*, 203 U. S. 106, l. c. 108.

(3) Whether or not said judgment to be reviewed conflicts with the law declared by the Supreme Court of Missouri, *en banc*, in *Loudenslager* v. *Gorum*, 355 Mo. 181, l. c. 188, in an opinion by the author of the opinion in the Court below, quoting the first three cases cited in the foregoing question; and whether the Division 1, in failing to follow the decision of the Supreme Court of Missouri, *en banc*, under the law stated in *State ex rel. Reynolds*, 278 Mo. 554, at l. c. 558, operated to deny Petitioner the equal protection of the laws under Section 1 of the XIVth Amendment to the Federal Constitution.

(4)(a) Whether or not the admissions by respondent's motion to dismiss of the truth of the well-pleaded facts in petitioner's second amended complaint in the Federal court, accepted and adjudged to be true by the Federal court as a condition precedent to its judgment of dismissal—and which motion and its admissions must forever remain on the records of the Federal courts—estop respondent from making any defense in the State court in conflict with the same facts as those admitted by it in the Federal court—and adjudged by said court to be true.

(b) And whether or not the decision to be reviewed conflicts with the decision of the Supreme Court of Illinois in *Jackson* v. *Industrial Board*, 280 Ill. 526, which court decided that dismissal of a case based on a Federal law on demurrer on the ground that relief could not be had

under the Federal law, did not bar a recovery on the same facts under the different State law, and that the ruling on demurrer not only estopped defendant from making contentions contrary to those admitted by its demurrer, but as to the questions admitted and found to be true, the judgment was binding on both parties.

(c) Whether or not under the decision to be reviewed, by denying to petitioner the benefit of respondent's admission in its motion to dismiss in the Federal court of the truth of the facts alleged in the second amended complaint in that court, adjudged to be true by said Federal court, and likewise affirmed by the United States Court of Appeals, upon the basis that the well-pleaded facts in said second amended complaint in the Federal court were true, and so adjudged by the Federal courts, conflicts with the following decisions of this Court and the Supreme Court of Missouri, *en banc,* holding to the contrary:

In the case of *State ex rel.* v. *James,* 361 Mo. 816, said Court, *en banc,* stated, l. c. 816:

> "The legal effect of such a motion under our new Civil Code is the same as that of a demurrer under the former practice, so that the well pleaded facts in relator's petition for the writ are to be treated as confessed, and as constituting the facts of the case."

The decision of the court below on July 11, 1955 (Vol. III, 90-104) is in direct conflict as to the effect of admissions of a permanently sustained demurrer or motion to dismiss, as it is in conflict with the decision of the Supreme Court of Missouri, *en banc.* The court below states that the question here raised was not the law of Missouri (Vol. III, 103) thus:

> "It is sufficient to say that this is not and never has been the law in this state."

But the question here involved is not a State, but a Federal, question, i. e., the effect to be given to admissions and adjudications embodied in the judgment of a Federal court.

In *Bissell* v. *Spring Valley Township,* 124 U. S. 225, at l. c. 232-233, this Court stated:

> "A judgment, rendered upon demurrer, is equally conclusive (by way of estoppel) of the facts confessed by the demurrer, as a verdict finding the same facts would have been, since they are established, as well in the former case as in the latter, by way of *record.* And facts, thus established, can never afterwards be contested, between the same parties, or those in privity with them."

In *City of Aurora* v. *West,* 7 Wall. 82, in holding that the facts in the pleading demurred to are admitted and adjudged to be true, this Court said, l. c. 98-99:

> "They were not only put in issue but they were determined, unless it be denied that the effect of a demurrer to the declaration or other pleadings, is that it admits all such matters of fact as are sufficiently pleaded. Such a denial, if made, would be entitled to no weight, as it is a rule universally acknowledged. I. Williams Saun. 337, n. 3; Steph. Pl. 155; 1 Saund. Pl. and Ev. 952; 1 Chit. Pl. 662.
>
> The foundation of the rule is that the party demurring, having had his option to plead or demur, should be taken, in adopting the latter alternative, to admit that he has no ground for denial or traverse. *Manchester Bk.* v. *Buckner,* 20 How. 108, 15 L. ed. 862."

(5) Whether or not the judgment to be reviewed is without adequate non-federal ground to support it, and whether this Court should examine Petitioner's petition in the State court so that it may ascertain whether or not

it is finally concluded by the State court's judgment as to the sufficiency of the pleading asserting Federal rights under the law declared in *Boyd* v. *Thayer,* 143 U. S. 135; *Brown* v. *Western Railway of Alabama,* 338 U. S. 294; *Truax* v. *Corrigan,* 257 U. S. 312; *American Ry. Express* v. *Levee,* 263 U. S. 1921; and *Davis* v. *Wechsler,* 263 E. S. 22-24.

(6) Whether the judgment to be reviewed is shown by the record to have been rendered in an effort to by-pass or evade the Federal questions raised, within the meaning of the law stated in *Ellis* v. *Dixon,* 349 U. S. 458, l. c. 463, holding:

> "It is established law that this Court is not finally concluded by the State court's determination as to the sufficiency of pleading asserting a Federal right."

(7) Whether the judgment sought to be reviewed so operated to deny Petitioner's Federal rights as to make the questions herein involved an important public and national question, so as to justify the issuance of the writ sought in this case; and whether or not trust companies can be permitted to assume fiduciary relations incident to the administration of estates, and then wholly ignore and disregard said fiduciary obligations, as did respondent herein. And whether or not said question is not a question which applies to all the people of this land and the administration of such property as they leave or inherit; and whether or not the time is ripe for keeping trust companies as to administration of estates within proper bounds.

Constitutional Provision and Statutes Involved.

Section 34 of Article VI Constitution of Missouri of 1875—first sentence.

Section 481.140 R.S.Mo. 1949.
Section 537.010 R.S.Mo. 1949.
Sections 86, 87 and 88 R.S.Mo. 1929.
Section 37 Kansas Statute of Wills 1868.
Section 1 of the XIVth Amendment to the Federal Constitution.
Section 2 of Article IV of the Constitution of the United States.
Section 1 of XIVth Amendment to the Federal Constitution—last sentence.

STATEMENT.

Respondent, claiming to be executor and administrator of Moffett estates, between July 14, 1928, and December 23, 1931 (Vol. I, p. 13, and also Exhibit "1," pages 9 to 14, and Vol. III, 42-44), instituted 14 groundless claims and actions against petitioner's testator and petitioner and their property interests in the courts, knowing that they were groundless, seeking judgments in excess of $5,000,000.00, and has unlawfully maintained same on the dockets of the courts since they were filed (except 3 dismissed in 1941 after they had been pending for 12 years). See paragraph 43 of Count I (Vol. I, 25) and paragraph 25 of Count II (Vol. I, 75-76) of the petition.

Petitioner commenced an action in the United States District Court at Kansas City on February 8, 1947, seeking recovery for the loss occasioned by the institution and maintenance of said groundless actions and of void judgments in the district court of Harper County, Kansas, entered without jurisdiction, and to satisfy which void judgments the property of petitioner's testator and of petitioner was used. Said action in the Federal court was based on the Federal Civil Rights Acts, and not on state law; and on respondent's motion to dismiss, which was sustained on December 1, 1949 (Vol. I, 58), said action was dismissed. (*Moffett* v. *Commerce Trust Co.*, 87 F. Supp. 438). Which Federal judgment of dismissal was affirmed (*Moffett* v. *Commerce Trust Co.*, 187 F. 2d 242) on the ground that since no defendant was a state officer, the other defendants were not liable, even though they conspired with state officers, under the Federal Civil Rights Acts, and that petitioner's remedy was not in the Federal court but in the State courts.

Petitioner thereafter commenced the action against respondent on February 25, 1952 (Vol. I, 1), seeking recovery under Section 537.010 R.S.Mo. 1949 for the loss occasioned by the institution and maintenance of said groundless suits (Vol. III, 42-44), and by sacrificing petitioner's property to satisfy void judgments entered on the records of the district court of Harper County, Kansas (Vol. I, 14-16), which said court had no jurisdiction to enter. Respondent filed a motion to dismiss petitioner's petition in the said circuit court (Vol. II, 91-97) and as grounds therefor alleged that the petition did not state a cause of action, that it was barred by *res judicata* resulting from the dismissal of the action in the Federal court on December 1, 1949, and by limitations. On appeal the Supreme Court of Missouri, affirmed the judgment of the circuit court on all the grounds therein stated, which grounds included failure to state a cause of action, *res judicata* of Federal court judgment and limitations (Vol. III, 89-90). In the first paragraph of the opinion (Vol. III, 90) appear the words:

> "Motion to dismiss plaintiff's amended petition was sustained for failure to state a cause of action and for other legal grounds stated therein. (These include *res judicata* and limitations.)"

Petitioner's dismissed petition is in 2 Counts. Count II embodied Count I and Exhibit "1," said exhibit being the second amended and dismissed complaint in the Federal court (Vol. I, 90).

Count II (Vol. I, 53-89, plus 90) pleaded respondent's motion to dismiss and the facts alleged in the second amended complaint (Exhibit "1," p. 90) and the admissions by respondent's motion to dismiss and the adjudication of the truth of the allegations so admitted by said

Federal court as a condition precedent to the rendition of the judgment of dismissal, and quoted from the opinions and briefs showing that the issues adjudged estopped respondent from denying the facts alleged in the later petition in the state court—same being substantially identical with those in the Federal court in the second amended complaint. And further alleged (Vol. I, 64):

> "And plaintiff further states that, by reason of said judgment of said Federal courts, every right, question and fact so admitted and so decided is binding upon the said defendant herein, and entitles plaintiff to an immediate judgment as prayed herein."

The second opinion (Vol. III, 176-179) at pages 176-177 states:

> "Plaintiff also says it is alleged in paragraphs 67 to 72 of Count One that the claims made in all of the actions listed as pending were settled before they were ever instituted: that defendant knew of this settlement; and that the actions were not brought in good faith but for the ulterior purpose of obtaining judgments for non-existing debts. It is true that this part of the petition alleged that the members of the various partnerships for several years prior to January 1, 1927, engaged in negotiations to settle disputes between them as to the correctness of their accounts and that as of that date agreed upon a settlement."

The Supreme Court of Missouri disposed of Count II of the petition (Vol. I, 53-89 plus 90), which, of course, embodied Count I and Exhibit "1," by the following statement (Vol. III, 94):

> "As to Count Two, we hold no cause of action is stated for the reasons given by the United States

Court of Appeals in *Moffett* v. *Commerce Trust Co.*, 187 Fed. (2d) 242."

The reasons given by said United States Court of Appeals were, l. c. 248:

> "But assuming that the State court proceedings were not within the jurisdiction of the courts which decided them, or that they were contrary to State law or procured by fraud or perjury, they were not void but, at most, erroneous."

contrary to all the law on the question, both State and Federal. And also that petitioner had no right to recover in the Federal court because, l. c. 247:

> "The protection of such rights and redress for such wrongs was left with the States."

A conspiracy in the statutory language of Sections 556.120 and 556.130 R.S.Mo. 1949, together with the institution of the groundless suits (Vol. I, par. 5, p. 4; Exhibit "1," p. 90, pages 9-14; Vol. III, 42-44), is alleged in the petition (Vol. I, 3-89 plus 90). An attorney for Commerce Trust Company acted as referee, over the objection of petitioner, and while acting as alleged referee in cause No. 339,134 in June, 1954, heard the evidence of the witnesses Edward Fraser, Clarence Farrar and Mrs. Clara Tittle, establishing that Mr. Fraser, a certified public accountant and for 23 years a member of the State of Missouri Board of Accountancy and an Edinburgh, Scotland, graduate, testified (Vol. III, 126-155) that the counsel for Commerce Trust Company telephoned him for the original letter signed by the only four men interested received by him as representative of two of the four men interested outlining the settlement of all the controversies which evidence was uncontradicted,

and established that respondent not only knew and received, and refused to produce, the original letter signed by the 4 men outlining the settlement which they had made of the controversies. Said letter was received by him after January 12, 1927.

Petitioner first knew of said testimony by hearing same on June 15 and 16, 1954, before said alleged referee, and pursuant to the law declared in *Phelps* v. *Water Works,* 165 Mo. App. 454, at l. c. 463, pointing out that the Supreme Court of Missouri has determined

> " * that matters arising in a case after an appeal has been granted may be presented to the appellate court and be considered by it in disposing of the case."

Petitioner filed a motion on November 1, 1954, for a continuance of the hearing of this case in the court below; and on November 8, 1954, Division 1 of the Supreme Court of Missouri, upon consideration of said motion and the exhibits filed supporting it (Vol. III, 126-165), sustained same. Respondent never questioned the truth of said testimony.

The opinion of June 11, 1955 (Vol. III, 90-104), states (pp. 90-91):

> "Reports of previous litigation concerning these estates which has been finally determined include * * "

citing a number of cases not introduced in evidence and of which the court below could not take judicial notice (*McIllvain* v. *Kavorinos,* 361 Mo. 749, *en banc*) and not set forth in petitioner's petition nor respondent's motion to dismiss. Nevertheless the opinion, at the end of said list of cases, states (Vol. III, p. 91):

> "Defendant's reliance on *res judicata* and limitations is based on these cases."

It was impossible for respondent to rely on the decision *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751, included in said list of cases, because the opinion in that case established a conflict between Commerce Trust Company in one capacity as plaintiff, and as defendant, prosecuting itself through the same counsel, rendering the Kansas judgments void. So that it could not be *res judicata* in its favor. It is pleaded by petitioner as *res judicata* on that issue (Vol. I, par. 42½, pages 24-25).

Petitioner's petition did not plead said cases except the above and the case in the Federal courts and respondent's motion to dismiss (Vol. II, 91-97) refers to only two cases —of which it does not give the titles—but said motion mentions certain dates, from which it appears—and the same matter also appears from Count II of petitioner's petition (Vol. I, 53-89 plus 90)—that the only cases included in said list which the opinion says respondent relied on as the basis of *res judicata* and limitations are *Moffett* v. *Commerce Trust Company,* 75 F. Supp. 303; *Moffett* v. *Commerce Trust Co.,* 87 F. Supp. 438; *Moffett* v. *Commerce Trust Co.,* 187 F. 2d 242; *Moffett* v. *Commerce Trust Co.,* 342 U. S. 618, 343 U. S. 989"—all of which are the same case. Respondent's motion claimed that only the decision of the Federal court of December 1, 1949, and a decision of the Supreme Court of Missouri rendered in 1946, were *res judicata.* Whereas the opinion herein (Vol. III, 94) agrees that a decision of the Supreme Court of Missouri *en banc* holds that a decision dismissing a case under the Missouri statute was not *res judicata.*

Count II of the petition (Vol. I, 60-61), alleges that the Federal court adjudged that petitioner's action was not barred by limitations. The judgment of the lower court, by deciding to the contrary, presents a Federal question. So neither *res judicata,* nor limitations, nor fail-

ure to state a cause of action had any basis in the record. And it is for this Court to decide whether or not the rulings on said question were mere attempts to by-pass or evade Federal questions.

The opinions of the court below do not discuss conspiracy except to state that there was a conspiracy. The opinion of July 11, 1955 (Vol. III, 90), states:

> "Plaintiff claims defendant was a party to a conspiracy to fraudulently make use of legal proceedings to injure plaintiff and her testator by commencing groundless actions in connection with the settlement of the estate of John Moffett and partnership estates in which John Moffett and her husband, Thomas Moffett, were partners."
>
> * * * * * * *
>
> Plaintiff's brief says, as to Count One: 'Said petition stated a cause of action in that:
>
> > A. Conspiracy. Said petition charged a conspiracy to institute and maintain groundless actions in violation of the common law and Sections 556.120 and 556.130 R.S.Mo. 1949.'"

As to conspiracy petitioner cites *Phillips & Sons* v. *Kilgore*, Fla., 12 So. (2d) 465; *White* v. *McCoy Land Co.*, 229 Mo. App. 1019, 87 S. W. (2d) 672; *White* v. *Scarritt*, 341 Mo. 1004, 111 S. W. (2d) 18; *Sovereign Camp Woodmen of the World* v. *O'Neill*, 266 U. S. 292, under the point conspiracy.

Sovereign Camp v. *O'Neill* and said cases do not discuss abuse of process—but conspiracy. The opinion states, l. c. 293:

> "* that the defendants had entered into an agreement and conspiracy to embarass and attempt to ruin the society; * * * * that nevertheless, acting in

> concert, and pursuant to their joint agreement and conspiracy, they had brought twenty-five separate actions at law against the society * "

Exhibit "1" also alleges a conspiracy, ignored in the opinions. The opinions do not refer to the allegations in the petition as to conspiracy in either Count I or Count II or Exhibit "1"—which is therein properly alleged.

The court below applied the repealed and common law, under which the allegations did not constitute a joint cause of action, and ignored Section 507.040 R.S. Mo. 1949 providing:

> "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

The other cases cited dealt with conspiracy to institute groundless actions. And yet the lower court decided that the petition did not state a cause of action. It may be that the Supreme Court of Missouri believes it has discretion to decide that a petition which states a perfect cause of action—does not state any cause of action—as in this case. In other words, that it has absolute discretion to decide that right is wrong, and wrong is right. It is evident that such discretion was realized in this case. But, as Justice Douglass decided in *State of New York* v. *United States,* 342 U.S., l. c. 884:

> "Absolute discretion, like corruption, marks the beginning of the end of liberty."

This Court pointed out in *Stefanelli* v. *Minard,* 342 U. S. 117, that it will never issue a writ of certiorari where

so to do would "centralize power so as to upset the federal system." That rule does not apply to this case, but its converse applies, and that is—that failure to issue the writ so as to compel a state court not to deprive a citizen of his Federal rights, in proper cases will more surely destroy the Federal system than its issuance in cases where so to do might upset the Federal system. There this Court pointed out, l. c. 123, that to grant the writ

> " * would invite a flanking movement against the system of state courts by resort to the Federal forum, with review if need be to this Court to determine the issue."

Evidently the Supreme Court of Missouri thought that principle applied to its action in this case, wherein its decision is in itself a flanking movement against a system of both State and Federal courts when they fail to give effect to Federal rights by overruling the law as declared by this Court in its judgments, and thus destroying the Federal rights of the citizens of the United States.

The opinions of the court below are based upon the repealed code and its common law concepts of a cause of action, in violation of new Section 509.040 R.S.Mo. 1949:

> "No technical forms of pleading or motion are required."

In *Coplen* v. *Zimmerman,* 271 S. W. (2d) 513, the Missouri court said, l. c. 515:

> " * the petition sufficiently states a claim upon which relief could be granted. Section 509.040 * "

In *Ackermann* v. *United States,* 340 U. S. 193-205, Justice Black said:

> "It does no good to have liberalizing rules * if, after they are written, their arteries are hardened by this Court's resort to ancient common law concepts."

Resasons for Granting the Writ.

(1) The decision in *Lawlor* v. *National Screen Service Corporation,* 349 U. S. 322, reversed the decision of the Court of Appeals (C. A. 3) in *Lawlor* v. *National Screen Service Corporation,* 111 F. 2d 934 at l. c. 936, wherein that court stated the question for decision as follows:

> "On the other hand if the plaintiff complains about a conspiracy, asks for damages for acts done pursuant thereto and to have the conspiracy stopped by injunction, when he loses that lawsuit by judgment is he barred from thereafter claiming damages for other acts, which he says are done in furtherance of the original conspiracy? We think he is, although neither counsel nor we have found an instance where on this very set of facts a court has so decided."

The court below by its opinion approved the act of respondent in keeping the groundless actions, which have been pending for 25 years, forever on the dockets of the courts, and to deprive petitioner of the property devised and bequeathed to her by preventing the settlement of the testator's estate. Petitioner's petition for transfer to the Court *en banc* (Vol. III, 106-125) asserted (p. 107) that said decision of the court below was contrary to all law, both State and Federal, which should have prevented that result. And that the decision of this Court in *Lawlor* v. *National Screen Service Corporation,* 349 U. S. 322, had ruled that such conduct could not be tolerated in this civilized land. This Court said, l. c. 329:

> "Acceptance of the respondents' novel contention would in effect confer on them a partial immunity from civil liability for future violations."

The judgment to be reviewed is in direct conflict with said Lawlor decision by this Court.

So that the question presented is whether or not the court below overruled said decision of this Court in the Lawlor case. And since said decision of this Court was as binding on Division 1 of the Supreme Court of Missouri as the express mandates of this Court in *Martin* v. *Hunter's Lessee,* 1 Wheat. 304 (on the Virginia Supreme Court), and in *Magwire* v. *Tyler,* 17 Wall. 253-294 (on the Missouri Supreme Court)—the Federal question thus presented by this record is as important and substantial as any ever presented to and decided by this Court.

(2) The decision to be reviewed is in direct conflict with the decisions of this Court in *Troxell* v. *Delaware L. & W. Ry. Co.,* 227 U. S. 434; *Ash Sheep Co.* v. *United States,* 252 U. S. 159; and *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S., l. c. 444; and also in conflict with the decision of the highest court of the State of Missouri, same being the court *en banc,* in *Loudenslager* v. *Gorum,* 355 Mo. 181, l. c. 188—wherein the author of the opinions herein cited and quoted from said decisions of this Court in support of his then decision that where a suitor has been denied a remedy in one jurisdiction because it does not afford a remedy for the particular wrong alleged can not be barred recovery in another jurisdiction which does provide a remedy. Incidentally, the opinion in *Loudenslager* v. *Gorum* was *en banc*—a decision of which, under the law declared by that Court *en banc* in *State ex rel.* v. *Reynolds,* 278 Mo. 554 at l. c. 558, holds:

> "So far as concerns the law in principle, however, the decision of Court *in Banc* is still the law and is

> in no wise modified or affected by a conflicting divisional decision."

The author of the opinions herein in said Loudenslager case, writing the opinion of the Court *en banc,* quoted from *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 444, thus:

> "The fact that a suitor has been denied a remedy by one state because it does not afford a remedy for the particular wrong alleged, may not bar recovery in another state which does provide a remedy. See *Troxell* v. *Delaware, L. & W. R. Co.,* 227 U. S. 434, 57 L. Ed. 586, 33 S. Ct. 274; cf. *Ash Sheep Co.* v. *United States,* 252 U. S. 159, 170, 64 L. Ed. 507, 512, 40 S. Ct. 241."

So that the question presented is whether or not the court below overruled said decisions of this Court in the *Troxell* v. *Delaware etc.* case, *Ash Sheep Company* v. *United States,* and *Magnolia Petroleum Co.* v. *Hunt* case. And since said decisions of this Court were as binding on Division 1 of the Supreme Court of Missouri as the express mandates of this Court in *Martin* v. *Hunter's Lessee,* 1 Wheat. 304 (on the Virginia Supreme Court), and in *Magwire* v. *Tyler,* 17 Wall. 253-294 (on the Missouri Supreme Court)—the Federal question thus presented by this record is as important and substantial as any ever presented to and decided by this Court.

(3) Count II (Vol. I, 53-89 plus 90), exclusive of Count I (Vol. I, 3-53) and Exhibit "1" (p. 90), pleads that respondent's admission contained in its motion to dismiss the case in the Federal court—the admissions in which motion to dismiss were adjudicated as true by said Federal court as a condition precedent to its jurisdiction to dismiss petitioner's case in the Federal court—estops respondent from contradicting the same facts admitted in

the petition in the State court, which were so admitted by respondent and adjudged to be true in the Federal court, and as the ground on which the judgment of dismissal of December 1, 1949, is based.

The opinion below of July 11, 1955 (Vol. III, 90-104), states the above Federal question at length and in detail. And it was likewise stated in the second opinion (Vol. III, 176-179) at page 178. The first opinion at pages 102-103 states the same facts with reference to the Federal question. As to said question the court below states, page 104:

> "It is sufficient to say that this is not and never has been the law in this State."

Which statement is contradicted by the decision of the Missouri Court *en banc* in *State ex rel.* v. *James,* 361 Mo. 814.

See also *Montgomery Ward* v. *Langlor,* 168 F. 2d 183, l. c. 185 (C. A. 8); *Bissell* v. *Spring Valley Township,* 124 U. S. 225, l. c. 232-233; *City of Aurora* v. *West,* 7 Wall. l. c. 99. Also *Jackson* v. *Industrial Board,* 280 Ill. 526, wherein the Supreme Court of that State ruled that where a plaintiff was defeated on demurrer in the first action on the ground that she had no right to recover under the Federal law, but that she had a right to recover under the State law, and that the first judgment was not *res judicata* against her right to recover under the State law, and that the admission by defendant on demurrer could never be contradicted by it in the State court case; and that the decision on demurrer as to the truth of the facts was binding on defendant in the new suit.

(4) The decision of the court below conflicts with the decision of this Court in *Dupasseur* v. *Rochereau,* 21 Wall. 130, in that the court below denied to petitioner the benefit of the point decided by the Federal court on De-

cember 1, 1949, when it accepted the admissions of the truth of the allegations in the second amended complaint in the Federal court and adjudged that said well-pleaded allegations were true. And notwithstanding the Federal courts denied relief because it held petitioner could not recover under the Civil Rights Acts because respondent and others were not state officers, and that there could be no recovery in the Federal court but that there could be in the State court where the law was different. And said State court failed to give effect to the said admissions and to the adjudication that the facts alleged in the second amended complaint were true after it had stated the Federal question raised in both of its opinions —and yet refused to give petitioner the benefit of the admissions and adjudication which authorized a judgment for petitioner. The author of the opinion in the court below in *United States ex rel.* v. *Lufcy,* 329 Mo. 1224, at l. c. 1231, quoted and applied the law on the same question as declared by this Court, thus:

> "In *Dupasseur* v. *Rochereau,* 21 Wall. 130, 22 L. Ed. 588, the Supreme Court of the United States said:
>
> > "Where a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which * * * may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States."

The opinion of October 11, 1955 (Vol. III, 178), states and decides the Federal question thus raised as follows:

> "However, we do not find any real Federal questions in the case. Plaintiff bases this claim on the

> contention that defendant's motion to dismiss the civil rights suit in the United States District Court, and that court's action thereon, admitted and adjudged the facts 'to constitute the basis of said judgment of dismissal and its affirmance cannot be controverted in this case by Commerce Trust Company —estopped, as it is, by said admissions and adjudications.' "

The court below also stated the same Federal question in its opinion of July 11, 1955 (Vol. III, 102-103).

(5) The decision of the court below affirming the judgment of the State circuit court on the ground that the petition did not state a cause of action, and that the judgment of the Federal court of December 1, 1949, was and is *res judicata,* authorizes this Court to examine the petition on the same basis as it was examined by Division 1 of the Supreme Court of Missouri to determine whether or not said petition stated a cause of action and whether said ruling by-passed or evaded the Federal questions in the case, and thereby denied petitioner her Federal rights (*Boyd* v. *Thayer,* 143 U. S. 135; *Brown* v. *Western R. Co. of Alabama,* 338 U. S. 294; *Truax* v. *Corrigan,* 257 U. S. 312.) See also *Ellis* v. *Dixon,* 349 U. S. 458, l. c. 463, holding

> "It is established law that this Court is not finally concluded by the state court's determination as to the sufficiency of pleadings asserting a federal right."

See also *American R. Express Co.* v. *Levee,* 263 U. S. 19, 21; *Davis* v. *Wechsler,* 263 U. S. 22, 24.

> "Misjoinder of parties is not ground for dismissal of an action." (Section 507.050 R.S.Mo. 1949.)

(6) It appears from the record that petitioner herein, in a legal sense, had the same standing in the courts in this case as the late Mr. Scott as plaintiff and later appellant in *Scott* v. *Emerson,* 15 Mo. 577 (top page 387), and as he later had in the case of *Dred Scott* v. *Sanford,* 19 How. 393-623, in this Court, to-wit: that petitioner had no right to sue respondent in any court. In other words, petitioner has had the experience of obtaining relief against the attorney for respondent (see 345 Mo. 741-751) in which case respondent was a party, and on issues which were and are *res judicata* against respondent herein but nevertheless petitioner has never been able to obtain any relief in any court against respondent itself for the last 25 years.

In *Riley* v. *New York Trust Co.,* 315 U. S. 343, l. c. 354, this Court states:

> "A state is interested primarily not in the payment of particular creditors, nor in the succession of heirs or beneficiaries, as such, but in the administration of the property of its citizens, wherever located, and that of strangers within its boundaries. In a society where inheritance is an important social concept, the managing of decedent's property is a *sovereign right* which may not be readily frustrated."

Petitioner herein

> " • with rare pertinacity, and undaunted by failure, persisted in the diligent pursuit of a remedy, as the schedule of the earlier litigation referred to in the margin demonstrates." (*Southern Pacific Co.* v. *Bogert,* 250 U. S. 483-501, l. c. 489.)

This record discloses that petitioner has been following the example set by the parties referred to in said opinion of Mr. Justice Brandeis, that "pertinacity in seeking a

remedy, and undaunted by failure," does not forfeit a litigant's right to justice.

(7) The record affirmatively shows no non-Federal grounds adequate to support the judgment of the court below. The judgment of the Supreme Court of Missouri in 345 Mo. 741-751, finding that Commerce Trust Company represented conflicting interests when it caused the rendition against itself of judgments in Harper County, Kansas, conclusively establishes that such judgments were void under the laws of Missouri, Kansas and the United States.

The Supreme Court of Missouri in *In re Partnership Estate of Moffett Brothers,* wherein respondent was a party and represented by its present General Counsel, 345 Mo. 741-751, found as to the litigation in Kansas, l. c. 750:

> "There can be no question on the conflicting interests of the John Moffett estate and the Moffett Brothers estate in the partition-accounting suit, and the rule that counsel cannot lawfully represent conflicting interests in the courts of the land is as old as our system of jurisprudence."

And at l. c. 751 also stated:

> "As we have stated above, there can be no question as to the conflict of interest, in the partition-accounting suit, between the John Moffett estate and the Moffett Brothers estate, and the rule, as we have seen, is that an attorney cannot receive pay from both sides where the respective interests are conflicting."

The author of the opinion as to the judgment to be reviewed, in *Gilliland* v. *Bondurant,* 332 Mo. 881, l. c. 888, declared the law of Missouri as follows:

> "'Besides, the fact that the defendants' *then* attorneys prepared all the papers in the case, including

> the form of the judgment, and were the only attorneys in the case and representing both sides which were *adverse* to each other, is sufficient to render the $500 judgment void •"

Respondent's attorney, B. C. Howard, was the only attorney representing respondent as executor of the John Moffett estate prosecuting alleged claims against itself as Missouri administrator of Moffett Brothers partnership, without any appointment as administrator by any Kansas court, and without any property of Moffett Brothers partnership estate in its possession or to which it had title in Kansas. The Kansas court in *State ex rel.* v. *Bradbury,* 123 Kan. 495, l. c. 499, recognized the like principle when it stated:

> "The due administration of justice in courts of law ordinarily requires adverse parties. • • • Indeed, the bare suggestion that these defendants be compelled to sue themselves has something about it which savors of the grotesque and bizarre."

In *Peyton* v. *Chase County Nat'l Bank,* 124 Kan. 763, a judgment was held void for like reasons. In *National Bank of Topeka* v. *Mitchell,* 154 Kan. 276, at l. c. 281, it is said:

> "The principles already stated are reinforced by the further proposition that the Oklahoma executor is a creature of Oklahoma law, exercising, under that law, no extraterritorial powers by virtue of his appointment."

For a like reason, Commerce Trust Company as alleged administrator of Moffett Brothers partnership estate was a creature of Missouri law exercising under that law no extraterritorial powers by virtue of its appoint-

ment. So that the judgments of the Harper County, Kansas, court were void because Commerce Trust Company, in the Harper County, Kansas, district court, as executor of the John Moffett estate prosecuted itself as alleged administrator of Moffett Brothers partnership estate as well as because the judgment against Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate was void because the Kansas court had no jurisdiction of respondent as said Missouri partnership administrator. And so it appears from the opinions below, as well as from the opinion in 345 Mo. 741-751, at l. c. 747, that the action was never revived against Mrs. Clark, and that she was not a party, and there was no property in Kansas of which the court had jurisdiction representing the Missouri partnership estate, or representing the Moffett Brothers Cattle, Land and Lumber Company in Oklahoma.

The opinion in *State to use Miller's Adm.* v. *Bidlingmaier,* 26 Mo. 483, has received an interpretation by the opinion of the court below (Vol. III, 97) different from the opinion of the Supreme Court of Missouri in 31 Mo. 95:

> "1. Where the interests of two estates in course of settlement conflict—as where there is a demand in behalf of one estate to be presented for allowance against the other—the same person cannot act as the administrator of both parties in the matter of obtaining an allowance of the demand; should a demand be allowed under such circumstances against one of the estates, the proceeding will be regarded as a nullity. (*State, to use, &c,* v. *Bidlingmaier,* 26 Mo. 483, affirmed.)"

The decision of the Supreme Court of Missouri herein, attempting to hold that the Harper County, Kansas, judgment was not void, is contradicted by the consideration

that the Kansas court had no jurisdiction to render a judgment against Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate, nor to partition Oklahoma lands, as shown by the allegations in paragraphs 27, 29 and 42 of Count I (Vol I, 15, 16 and 24).

In *Thompson* v. *Whitman,* 18 Wall. 457-471, l. c. 469, this Court stated:

> "On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the 4th article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

In *Leichty* v. *Kansas City Bridge Co.,* 354 Mo. 629, and *Stuart* v. *Dickinson,* 290 Mo. 560, and wherein in the Leichty case, at l. c. 634, the Supreme Court of Missouri *en banc* stated:

> "'A judgment rendered in one state is subject to collateral attack in another state on the ground that the state in which the judgment was rendered had no jurisdiction over the defendant or over the subject matter, even though it appears in the judgment record that the court had jurisdiction and extrinsic evidence is necessary to establish its invalidity.' (Restatement of the Law, 'Judgments,' page 71, Section 12 (c).)"

Consequently the findings of the court below that the Kansas judgments were not void as a matter of law, without giving petitioner an opportunity to prove the allegation in the petition that they were void because of lack of jurisdiction was in direct conflict with the decision of the Supreme Court of Missouri *en banc* in the above entitled

cases. In said Leichty case the author of the opinions in this case concurred. Petitioner was entitled to offer evidence establishing lack of jurisdiction. So that the decision of the court below is also in conflict with the decisions of this Court in *Thompson* v. *Whitman,* 18 Wall. 457; *Brown* v. *Fletcher's Estate,* 210 U. S. 88, and *Cooper* v. *Newell,* 173 U. S. 565, 566, 567.

The foregoing decisions of this Court, and said decisions of the Supreme Court of Missouri *en banc,* are in direct conflict with the decision of the Missouri Supreme Court herein, which conflict with reference to the *en banc* decisions, denied petitioner the equal protection of the laws guaranteed by Section 1 of the XIVTH Amendment.

(8) Paragraphs 2, 3 and 4 of the second amended complaint (Vol. I, Exhibit "1" 90, pages 3-5) allege that certain Missouri statutes are void because of conflict with the due process and equal protection of the laws as said void statutes were the basis of the void order of a non-existing probate judge appointing Commerce Trust Company in conflicting capacities to represent Moffett estates provided by the XIVTH Amendment to the Federal Constitution. Said opinion states in brackets (Vol. III, 96) as to appointment by the "special" probate judge:

> "(There was specific authorization for such a statute in our 1875 Constitution, Art. IV, Sec. 29.)"

Paragraph 29 of petitioner's motion for rehearing (Vol. III, 106-125) at page 119 pointed out:

> "(29) On page 7 of its opinion this Court states—concerning the appointment of Commerce Trust Company as a 'special' probate judge:
> "(There was specific authorization for such a statute in our 1875 Constitution, Art. IV, Sec. 29.)"

"Section 29 of Article IV of said Constitution, embodied in the 1929 Revision, deals only with legislative proceedings.

"Section 29 of Article VI provides for the election of special *circuit* judges. But there is no provision in the Constitution of 1875 authorizing a statute to provide for 'special' *probate* judges. On the contrary, Sections 34 and 35 of Article VI prohibit such statutes. Section 34 provides:

"The General Assembly shall establish in every county a probate court, which shall be a court of record, and consist of one judge, who shall be elected."

Section 35 provides:

"Probate courts shall be uniform in their organization, jurisdiction, duties and practice, * "

"The later statute, Laws 1911, pages 188-189, provides for the election of 'special' probate judges, in addition to the one judge provided for by Sections 34 and 35 of said Constitution, was in direct conflict with said provisions."

The Record shows a change from Article IV to Article VI of the Constitution after petitioner's said motion was filed on July 26, 1955 (Vol. III, 106-125), at pages 119-120, calling attention to the error.

U. S. C. 28, Section 1257 (3), authorizes review by certiorari of the decision of the lower court, holding said statute valid, notwithstanding said statute conflicts with the Federal Constitution. So Commerce Trust Company was never an executor or administrator of any Moffett estate.

(9) John Moffett, while a bachelor, made his will, prepared by respondent through its trust officer. No child or children were ever born of which John Moffett was father. For which reason petitioner's rights, as alleged in paragraphs 7 and 12 of the second amended complaint (Exhibit "1", Vol. 1, 90), though protected by Section 2 of

Article IV of the Federal Constitution, were denied to her and her property given by the courts to the widow of John Moffett, now Mrs. Helen Weede.

Petitioner's right under the proviso of Section 37 of the Kansas Statute of Wills of 1868 denied petitioner, as a Missouri citizen, the benefit of the law of Kansas to the effect that a will executed by a bachelor, who married and died without child born, is not revoked, and petitioner's right and privilege under the law of Kansas to acquire the property bequeathed and devised to her, could not be denied by any court without violating the provisions of Section 2 of Article IV of the Federal Constitution. Said Federal question alleged in paragraphs 7 and 12 of Exhibit "1", made part of Count II (Vol. III, 53-89 plus 90), was erroneously decided as appears from the first opinion (Vol. III, p. 103):

> "Plaintiff also says the will of John Moffett, made when he was a bachelor, was not revoked by his marriage and death without children being born, citing *Shorten* v. *Judd,* 60 Kan. 73, 55 Pac. 286; and *Vanek* v. *Vanek,* 104 Kan. 624, 180 Pac. 240. Therefore, plaintiff says John Moffett's widow misappropriated the interest of Thomas Moffett in the Kansas land; and that defendant is responsible for this, because it advised her she could elect to reject the will."

Which will of John Moffett was prepared by respondent through its Trust Officer in violation of the law of Missouri, Sections 484.010 and 484.020, R.S.Mo. 1949 (Laws, 1915, pp. 99-100). Such act was held by the Supreme Court *en banc* in *State ex inf. Miller* v. *St. Louis Union Trust Co.,* 335 Mo. 845, to warrant forfeiture of its charter and life, l. c. 872.

(10) As to the other Federal questions in the case, petitioner, if permitted, will discuss same in her brief on the merits after the issuance of the writ of certiorari.

Conclusion.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

MARTIN J. O'DONNELL,
Attorney for Petitioner.

APPENDIX A.

Section 2 of Article IV of the Constitution of the United States:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Section 1 of the XIVth Amendment to the Federal Constitution—last sentence:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 34, Constitution of Missouri of 1875, the first sentence is:

> "The Geneal Assembly shall establish in every county a probate court, which shall be a court of record, and consist of one judge, who shall be elected. *."

Section 481.140, R.S.Mo. 1949:

> "481.140. Whenever the judge of probate, from any cause, shall be unable to hold any term or part of term of court, the attorneys of the court who are present, but not less in number than five, may elect one of their members then in attendance, having the qualifications of a judge of probate, to hold the court for the occasion, or to hold the court for a part of a term (2458)."

Section 537.010, R.S.Mo. 1949:

"537.010. For all wrongs done to property rights, or interest of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrongdoer, and, after his death, against his executor or administrator, in the same manner and with like effect, in all respects, as actions founded upon contract (98)."

Sections 86, 87 and 88, R.S.Mo. 1929:

"Sec. 86. *If such bond is not executed, executor, etc., of deceased partner to give bond, etc.*—In case the surviving partner or partners shall neglect or refuse to give the bond required by this article, within thirty days after the granting of letters testamentary or of administration on the estate of the deceased partner, the executor or administrator of the deceased partner shall give bond, in addition to the bond given by him as executor or administrator, in a sum at least double the value of the whole copartnership estate, secured as bonds in other cases of administration, and conditioned that he will faithfully execute the trust and with no unnecessary waste or expense, which bond may be enforced like other administration bonds (R.S. 1919, sec. 85)."

"Sec. 87. *Duties of surviving partner to representatives of individual estate.*—Every surviving partner, on the demand of any administrator or executor of a deceased partner, shall exhibit to the appraisers the partnership property, belonging to the firm at the time of the death of such deceased partner, for appraisement; and in case the administration thereof shall devolve on such administrator or executor, the said survivor shall surrender to him, on demand, all the property of such partnership, including their

books and papers, and all necessary documents pertaining to the same, and shall afford him all reasonable information and facilities for the execution of his trust (R.S. 1919, sec. 86)."

"Sec. 88. *Penalty for failing to comply with preceding sections.*—Every surviving partner who shall neglect or refuse to comply with the provisions in the last two preceding sections may be cited for such neglect or refusal before the proper court; and unless he comply with such provisions, or show sufficient cause for his omission, the court may commit him to the common jail of the county, there to remain until he consent to comply, or is discharged by due course of law (R.S. 1919, sec. 87)."

Section 37, Kansas Statute of Wills 1868:

"Sec. 9814. REVOKED. Sec. 37. A will shall be revoked by the testator tearing, canceling, obliterating or destroying the same with the intention of revoking it by the testator himself, or by some person in his presence or by his direction, or by some other will or codicil in writing executed as prescribed by this act, or by some other writing signed, attested and subscribed in the manner provided by this act for the making of a will; but nothing herein contained shall prevent the revocation implied by law from subsequent changes in the condition or cirmumstances of the testator."

APPENDIX B.

In the Supreme Court of Missouri
Division Number One.
April 1955 Session.

Louise McGrew Moffett, as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased,
Appellant,

vs. No. 44,091

Commerce Trust Company,
a Corporation, Respondent.

Appeal from the Circuit Court of Jackson County, Missouri.

Honorable Elmo B. Hunter, Judge.

Action for damages in the amount of two and one-half million dollars. Motion to dismiss plaintiff's amended petition was sustained for failure to state a cause of action and for other legal grounds stated therein. (These included *res judicata* and limitations.) The dismissal was with prejudice and plaintiff has appealed. (Plaintiff is a party both individually and as executrix but we will refer to plaintiff in the singular only.)

Plaintiff claims defendant was a party to a conspiracy to fraudulently make use of legal proceedings to injure plaintiff and her testator by commencing groundless actions in connection with the settlement of the estate of John Moffett and partnership estates in which John Moffet and her husband Thomas Moffett were partners. Reports of previous litigation concerning these estates which has been (90) finally determined include *Moffett* v.

Moffett, 131 Kan. 546, 292 Pac. 942; *Moffett* v. *Moffett,* 131 Kan. 582, 292 Pac. 947; *Moffett* v. *Moffett,* 283 U. S. 826, 51 S. Ct. 351, 75 L. Ed. 1440; *Clark* v. *Moffett,* 136 Kan. 711, 18 Pac. (2d) 555; *Clark* v. *Moffett,* 290 U. S. 642, 54 S. Ct. 61, 78 L. Ed. 558; *Moffett* v. *Robbins,* 14 Fed. Sup. 602; *Moffett* v. *Robins,* 81 Fed. (2d) 431; *Moffett* v. *Robbins,* 298 U. S. 675, 56 S. Ct. 940, 80 L. Ed. 1397; *Moffett Bros. Partnership Estate* v. *Moffett,* 345 Mo. 741, 137 S. W. (2d) 507; *Moffett* v. *Commerce Trust Co.,* 354 Mo. 1098, 193 S. W. (2d) 588; *Moffett* v. *Commerce Trust Co.,* 329 U. S. 669, 827, 67 S. Ct. 82, 184, 91 L. Ed. 590; *Moffett* v. *Commerce Trust Co.,* 75 Fed. Sup. 303; *Moffett* v. *Commerce Trust Co.,* 87 Fed. Sup. 438; *Moffett* v. *Commerce Trust Co.,* 187 Fed. (2d) 242; *Moffett* v. *Commerce Trust Co.,* 342 U. S. 818, 879, 343 U. S. 989, 72 S. Ct. 32, 163, 1070, 96 L. Ed. 618. Defendant's reliance on *res judicata* and limitations is based on these cases.

Plaintiff's petition is in two counts, both asking judgment for the same damages. Count Two adopts every allegation of Count One and of Exhibit 1 made a part of the petition. Exhibit 1 contains the petition in the suit in the United States District Court in Kansas City (75 Fed. Sup. 303, 87 Fed. Sup. 438, 187 Fed. (2d) 242) and other exhibits presented to the Federal Court. We will consider all facts set out in the petition and attached exhibits. (Sec. 509.130; statutory references are to RSMo and V.A.M.S.) The petition contains many charges and statements in the form of conclusions and also cites and quotes from some of the decisions herein above set out. The petition covers 86 pages in the typewritten transcript with 72 printed pages of exhibits. The following facts about the course of the litigation appear therefrom. John Moffett made his will February 21, 1921, one day before he was married. (His widow is now Helen Weede, having

remarried.) The will devised all of his property to his relatives, except a bequest of $5000.00 to Miss Helen Mustard, who became his wife; and appointed his brother Thomas Moffett executor, naming de- (2—91) fendant alternate executor. (For a copy of the will of John Moffett see *Zombro* v. *Moffett,* Mo. Sup., 44 S. W. (2d) 149, l. c. 150.) It is alleged that defendant (by its trust officer B. C. Howard) prepared the will in consideration of being appointed alternate executor. John Moffett died August 23, 1927 and Thomas Moffett was given letters as executor by the Probate Court of Jackson County. It is alleged that defendant advised the widow that she could defeat the will by electing to reject it and take one-half of the estate. (The Supreme Court of Kansas upheld this view of the cases above cited.) In November 1928, Thomas Moffett was removed as executor on the ground of conflicting interests because of his claimed indebtedness to the partnership estates of Moffett Brothers and Moffett Brothers and Andrews, in which both John Moffett and Thomas Moffett had been partners, and also indebtedness of Thomas Moffett and the partnership estates to the John Moffett estate. Thereafter, defendant was appointed to administer the John Moffett estate and both partnership estates; and the litigation over the rights of the parties continued for many years in Kansas, Missouri and the Federal Courts. Thomas Moffett died December 22, 1930 and plaintiff was given letters as executrix of his estate. She alleges that she is the sole beneficiary under his will.

The theory of the first count of the petition is that defendant conspired with the widow of John Moffett and others (attorneys, accountants, etc.) to institute and maintain groundless actions in which it had no individual interest to injure plaintiff and her husband and to obtain

his property; and that defendant was also guilty of abuse of process. It is because these actions were successfully terminated, in favor of the estates of which defendant was executor or administrator, that plaintiff claims to have been damaged. The petition and exhibits set out at considerable length the course of the litigation and incidents connected with it, including the judgment rendered in the District Court of Harper County, Kansas (affirmed 18 Pac. (2d) 555) in which the principal determinations of the rights of the parties was (3—92) made and which is especially attacked and claimed to be the result of fraud. This Harper County case, commenced by Thomas Moffett (who died before the trial) as a partition suit, involved the parties' interests in land and an accounting between them and their partnerships. It resulted in judgments in favor of the John Moffett estate for $143,829.96 against the Moffett Brothers estate, for $27,399.25 against the Thomas Moffett estate, and for $101,288.06 against the Moffett Brothers Cattle, Land and Lumber Company. Fourteen suits against the Thomas Moffett estate, alleged to be fictitious and groundless, are listed including one still pending in the Circuit Court of Jackson County. These proceedings include claims filed in the Probate Court of Jackson County and in the Probate Courts of Chautauqua and Wyandotte Counties in Kansas. As to Count Two, plaintiff's brief says it "contains allegations as to action in the federal courts based on the Federal Civil Rights Acts, same being Sections 41, 42, 43, 47 and 48, Title 8, U.S.C.A." and "contains extracts from the opinions in the United States District Court for the Western District of Missouri, and of the United States Court of Appeals for the Eighth Circuit, establishing that said courts—while accepting the truth confessed by respondent's motion to dismiss alleged in the second amended

complaint (Exhibit 1) in the federal court—yet decided that the action was against persons who were found by said federal courts not to be exercising state power, and that said federal courts were without jurisdiction to grant appellant any relief. * * * In substance, Count II alleged that respondent was estopped by its admissions of the truth of the allegations of the second amended complaint in said federal court proceedings, and that said federal court proceedings did not estop appellant from instituting this action."

We must hold that the trial court was correct in holding this petition did not state a cause of action. In the first place, we held in the former case of *Moffett* v. *Commerce Trust Company, supra* (193 S. W. (2d), l. c. 591), the petition failed to state a joint cause of (4—93) action and that is what plaintiff attempts to do now. Plaintiff says the judgment in that case, under our old code of procedure for treble costs on finding a third petition insufficient (repealed Sec. 948 RS 1939), was not a decision on the merits which could be *res judicata* and was not a bar to any future proceedings involving the same facts, citing *Gordon* v. *Burris,* 125 Mo. 39, 28 S. W. 191; *State ex rel. Damon* v. *McQuillin,* 246 Mo. 674, 152 S. W. 341; *Gibson* v. *Armour & Co.,* Mo. App., 219 S. W. 152. *Be that as it may,* and *these cases seem to so hold,* we reaffirm our previous ruling and hold that this petition fails to state a joint cause of action for the reasons stated in our former opinion.

However, we will now go further, as we did not do in our previous decision, and hold that no cause of action is stated in favor of plaintiff, either individually or as executrix, in either count. As to Count Two, we hold no cause of action is stated for the reasons given by the

United States Court of Appeals in *Moffett* v. *Commerce Trust Co.*, 187 Fed. (2d) 242. Plaintiff's brief says, as to Count One: "Said petition stated a cause of action in that: A. Said petition charged a conspiracy to institute and maintain groundless actions in violation of the common law and sections 556.120 and 556.130. B. Said petition charged respondent, individually, with unlawful maintenance of said actions, in which it had no individual interest. C. Said petition charged respondent with abuse of process." Section 556.120 makes conspiracy to do certain things a crime (including "falsely or maliciously to move or maintain any suit") and Section 556.130 requires an overt act except in certain instances. Plaintiff also relies on Section 537.010, providing for survival of actions for wrongs done to the property rights or interests, and Section 537.030, preserving right of action to persons injured by commission of crime. (As to nature of tort action of conspiracy see *Kansas City* v. *Rathford,* 353 Mo. 1130, 186 S. W. (2d) 570.) Maintenance, in the modern view, "is an officious intermeddling in a suit which in no way belongs to one, by maintaining (5—94) or assisting either party, with money or otherwise, to prosecute or defend it." (10 Am. Jur. 549, Sec. 1; see also 14 C.J.S. 357, Sec. 1; 4 Stephen's Commentaries 263; Warren's History of the American Bar, p. 24; *State* v. *Bacon,* 27 R. I. 252, 61 Atl. 653.) "The purpose of the law of champerty and maintenance was to prevent officious intermeddling in the affairs of others for purposes of speculation or other unworthy motives, and to prevent the strong and influential men of early English times from oppressing the weak." (*Curry* v. *Dahlberg,* 341 Mo. 897, 110 S. W. (2d) 742, l. c. 748.) Certainly as a lawfully authorized executor (and administrator of the partnership estates) defendant had not only the right but the duty to collect debts due it and

to prosecute suits in favor of the estate for that purpose. (Sec. 462.140; 21 Am. Jur. 495-497, Sec's. 221-224; 33 C.J.S. 1136-1142, Sec's. 167-169; 2 Woerner, American Law of Administration 1013, Sec. 321.) With such authority and duty, it could not be guilty of maintenance or unlawful conspiracy to maintain these actions.

Plaintiff, however, contends that defendant did not have this authority or duty because its appointment as executor was void. Plaintiff claims this because it was alleged that defendant's appointment was made when a special probate judge was presiding in the Probate Court of Jackson County; that defendant's participation in preparing the will, in which it was named alternate executor, amounted to unlawful practice of law and trading for appointment as executor; and that defendant was representing conflicting interests in being executor of the John Moffett estate and administrator of the partnership estates. Plaintiff says defendant's unlawful practice of law and its other illegal acts prevented the vesting in it of title to any asset or cause of action of the estate. It is our view that the facts stated concerning these contentions do not show that its appointment was void or show that defendant was a mere intermeddler in the litigation so as to be guilty of maintenance. In the first place, defendant was a party to all of these suits and not a bystander aiding other parties in their own suits. (6—95) As to appointment by a special judge, the statute then in force (now Sec. 481.140) authorized a special judge and no facts are stated in the petition to show that the special judge was not properly selected and qualified to act at that time. (There was specific authorization for such a statute in our 1875 Constitution, Art. IV, Sec. 29.) We note that this matter was previously raised and decided against plaintiff. (See *Clark* v. *Moffett, supra,* 18 Pac.

(2d) l. c. 558.) The other matters raised (including the claim that defendant was illegally practicing law in preparing the will) perhaps could have been grounds for refusing to appoint defendant or for revocation of its letters (See Sec. 461.500) but they were certainly not an absolute disqualification. Plaintiff cites *Nute* v. *Fry,* 344 Mo. 163, 125 S. W. (2d) 841, in support of the claim that defendant's appointment was void, because of the allegation that it traded for its appointment, but that was a case of attempting to enforce against an estate of a guardian the payment of the consideration of an illegal contract for appointment as guardian and the validity of the acts of the guardian therein was not involved. What plaintiff is really trying to do is to collaterally attack the validity of the orders of the Probate Court granting defendant letters as executor and administrator. Since the facts stated do not show this action to be absolutely void any such collateral attack must fail.

It is likewise true of the claim as to representing conflicting interests that while this might have been a ground for refusal of appointment or revocation of letters, it was not an absolute disqualification. It is not alleged that plaintiff sought the remedy of removal in the Probate Court of Jackson County or that there was an appeal from any action taken by that court. It seems to be generally held that an interest adverse to the estate is not an absolute disqualification to being executor or administrator but may be ground for refusal to appoint, or for removal, depending on the circumstances of the particular case. (21 Am. Jur. 461-463; Sec's. 156-157; 33 C.J.S. 913, Sec. 28; annotation 18 A.L.R. (2d) 633; 2 Limbaugh's Missouri Practice (7—96) 451, Sec. 957; 2 Woerner 888, Sec. 273; *State ex rel. Evans* v. *Stalhuth,* Mo. App., 183 S. W. (2d) 384; *Grover* v. *Aegerter,* 226 Mo. App. 128,

42 S. W. (2d) 974; *Davis* v. *Roberts,* 206 Mo. App. 125, 226 S. W. 662; *State ex rel. Flick* v. *Reddish,* 148 Mo. App. 715, 129 S. W. 53.) Plaintiff cites *State to Use of Miller's Adm'r.* v. *Bidlingmaier,* 26 Mo. 483, in which we said the probate court should not have permitted the same individual to represent interests hostile to each other by being administrator of two estates, one of which had a large claim against the other. The estates were those of a husband and wife. The husband died while he was administrator of his wife's estate and one Kehr was then appointed administrator of both estates. Kehr made final settlement of the husband's estate showing a large amount due the wife's estate (which the court adjudged to be due) and then, as administrator of the wife's estate, Kehr brought suit against the sureties on the husband's bond as administrator to collect this judgment in favor of the wife's estate. The sureties were not notified of the final settlement and had no opportunity to defend. This Court said: "There is no other mode of treating such irregularities than by regarding the proceedings in which they occur as nullities." Apparently the judgment was based only on the administrator's action in charging this amount against the husband's estate in his final settlement; and it was this judgment and not the administrator's appointment that was held void.

The situation in this case is very different. There was no lack of opportunity to defend in this case. The petition shows the judgments resulted from a trial in the District Court of Harper County, Kansas. This is identified through the exhibits as the Kansas case hereinabove cited. There was a complete and thorough accounting between the estates involved with books and records before the court. The contention was made therein that defendant was intervening in two capacities which were in conflict

and the court on the first appeal said: "But we think there is no such conflict as would make it difficult for the trial court to ascertain and adjudicate the respective (8—97) rights of the parties." (*Moffett* v. *Moffett, supra,* 292 Pac., l. c. 950.) It also appears that a sister of plaintiff was ancillary administrator in Kansas for the estate of Thomas Moffett and the Moffett Brothers partnership estate, and appeared as representative of the Thomas Moffett estate in the Kansas litigation in which the accounting was had. (See *Moffett Bros. Partnership Estate* v. *Moffett, supra* (137 S. W. (2d), l. c. 509.) Furthermore, our statute (Sec. 461.650) gives a surviving partner the right to administer the partnership estate as did the common law (2 Limbaugh 492, Sec. 980) although he would necessarily have claims against it as part owner of its assets and otherwise. Section 461.700 provides that, if the surviving partner does not within the time therein specified give the required bond (see Sec. 461.680), then the administrator of the deceased partner shall give bond and he becomes administrator of the estate. (See Sec's. 461.660 and 461.720; 2 Limbaugh 493, Sec. 981.) Thus our statutes specifically authorized the administration by defendant of the estate of John Moffett and his partnership estates. Whether this is a wise provision is for the Legislature and not for the courts. (As to basis for such policy see 1 Woerner 450-458, Sec's. 129-130; 40 Am. Jur. 332-334, Sec's. 293-295; 68 C.J.S. 792-794, Sec's. 287-288.) Certainly partnership administration is essentially different from other administration.

Plaintiff also cites and relies on the case of *Moffett Brothers Partnership Estate* v. *Moffett, supra* (137 S. W. (2d) 507) to establish her claims as to conflicting interests. In that case we held an attorney could not be allowed a fee for services in the Kansas accounting case from both

the John Moffett estate and the Moffett Brothers partnership estate; but we did approve the allowance of a fee for other services by this attorney to the partnership estate. The situation as it concerns plaintiff's allegations and contentions as to conflicting interests and conspiracy in instituting and maintaining groundless suits is well stated in *Moffett* v. *Robbins, supra* (81 Fed. (2d), l. c. 435) in ruling on similar contentions made by plaintiff in a suit to (9—98) enjoin the enforcement of the Kansas judgment, holding that it was necessary to state facts showing extrinsic rather than intrinsic fraud to obtain the relief sought. The Court said: "In order to come within the rule, it must appear by clear allegations of fact that the party asserting it had a valid defense to the cause of action on which the judgment was rendered; that he was prevented by extrinsic fraud, accident, mistake, concealment, or other chicanery from presenting such defense, and that he had not been negligent in availing himself of it. * * * Manifestly, therefore, the allegations that Thomas S. Moffett was wrongfully removed as executor of the estate of John Moffett; that the estate of John Moffett had no valid claim against the partnership; that the claim was fictitiously filed in Missouri with knowledge that under the law of that state it could not be maintained there; that with such knowledge Commerce Trust Company intervened in the suit for partition and accounting in an effort to have it established there; that in doing so and in failing to advance available defenses thereto, the Trust Company violated its fiduciary duty to the partnership and that the defendant likewise violated his obligation to the partnership by cooperating with the Trust Company and Helen Moffett in the action; that the books and records upon which the claim was predicted were unreliable and untrue, and that with knowledge of that

fact those advocating the claim introduced them in evidence, present intrinsic fraud because all of those facts were before the state court. Those matters were involved, thoroughly litigated, and finally adjudicated there; and the charge in the present bill that they occurred in consequence of a conspiracy does not convert them into extrinsic or collateral fraud." (See also *Hockenberry* v. *Cooper County State Bank,* 338 Mo. 31, 88 S. W. (2d) 1031 and cases cited. Plaintiff's present petition is defective and insufficient in this same respect.

As to abuse of process, plaintiff cites *Phillips & Sons* v. *Kilgore,* Fla., 12 So. (2d) 465; *White* v. *McCoy Land Co.,* 229 Mo. App. 1019, 87 S. W. (2d) 672; *White* v. *Scarritt,* 341 Mo. 1004, 111 S. W. (2d) (10—99) 18; *Sovereign Camp Woodmen of the World* v. *O'Neill,* 266 U. S. 292, 45 S. Ct. 49, 69 L. Ed. 293. It is true that abuse of process is different from malicious prosecution and the fact that an action is still pending between the parties in the Circuit Court of Jackson County is not a bar to an action for abuse of process. (See A.L.I. Restatement of Torts, Sec. 682; Prosser on Torts, 892, Sec. 98; Am. Jur. 176, Sec. 3, p. 178, Sec. 6, p. 180, Sec. 9; Annotation 80 A.L.R. 580; *Thompson* v. *Farmers' Exchange Bank,* 333 Mo. 437, 62 S. W. (2d) 803.) As stated by Prosser: "The purpose for which the process is used, once it is issued, is the only thing of importance. Consequently in an action for abuse of process it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favor, or that it was obtained without probable cause or in the course of a proceeding begun without probable cause. * * * The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. Some

definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. * * * The ulterior motive may be inferred from the wrongful use made of the process, but the use itself may not be inferred from the motive." Likewise, the Restatement of Torts comment, under Section 682, is: "The gravamen of the misconduct for which the liability stated in this Section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings which were brought with probable cause and for a proper purpose or even that the proceedings terminated in favor of the person (11—100) instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed under the rule stated in this Section."

White v. *Scarritt, supra* (111 S. W. (2d) 18) is a good example of proper process being used for an ulterior purpose. There defendants had brought a taxpayers' suit to determine the validity of an election (to incur indebtedness to buy land for a courthouse) seeking to enjoin the levy of taxes for the purpose authorized. The courthouse site had been selected and 90 day options taken from the property owners. Plaintiff's tenants had moved out and the options were about to expire. If that happened, a new site was to be selected and plaintiff would lose her advantageous sale and be left with vacant mortgaged prop-

erty. Defendants used the threat of continuing the suit to compel plaintiff and other land owners to pay to them a fixed porportion of their sale price to get the suit dismissed before the options expired. Of course, the defendants had the right as taxpayers to bring such a suit but it acted wrongfully in using the suit for the purpose of extorting money from the property owners, which they did not owe and could not have legally been compelled to pay. The trouble with plaintiff's petition herein is that it is based on allegations of wrongful motives in commencing all of the litigation and on intrinsic fraud in carrying it on but shows a state of facts under which it was defendant's duty to have the matters in issue determined. It also shows that these issues of indebtedness to the estates were determined against plaintiff's testator in actions which were proper for that purpose. A case in which no abuse of process was shown is *Docter* v. *Riedel,* 96 Wis. 158, 37 L.R.A. 580, 65 Am. St. Rep. 40, where, although the motive was bad, the use of process was within the rights of the defendant. The court said therein that the test was: "whether the process has been used to accomplish some unlawful end or to compel the defendant to do some collateral thing which he could not legally be compelled to do." That is exactly what was done in *White* v. *Scarritt, supra,* namely, the land- (12—101) owners were compelled to pay the Land Company money which they could not have been legally compelled to pay and for a matter collateral to anything involved in the pending action. However, in this case whatever the motive, the end sought was not unlawful, or beyond the authorized purpose of the process initiated, because it was to establish indebtedness to the estates represented by defendant and obtain judgments therefor. If there was intrinsic fraud in obtaining the judgments that was not abuse of process. Neither was

plaintiff's testator or his estate compelled to do some collateral thing outside of and apart from judgments that could legally be obtained in these proceedings. Therefore, our conclusion is that the petition does not state a case of abuse of process. Because of our ruling that the petition does not state a cause of action, for either abuse of process or conspiracy for unlawful maintenance, it is unnecessary to pass on the grounds of *res judicata* and limitations.

Plaintiff makes some other contentions, all of which are without merit, but we will briefly comment on three of them. Plaintiff complains that no notice was given of the time for hearing on the motion to dismiss which plaintiff says violated constitutional due process and equal protection clauses and made the order of dismissal void. What happened was that, after plaintiff's amended petition had been filed and defendant's motion to dismiss had been filed against it, plaintiff, on October 20, 1952, was given leave to amend by interlineation; then defendant refiled its previously filed motion to dismiss. On December 12, 1952, plaintiff filed motion to dismiss defendant's motion and on June 10, 1953, plaintiff filed a motion for judgment. All motions were orally argued by attorneys for both parties on August 6, 1953, both having previously submitted lengthy written suggestions. Certainly there was no lack of opportunity to be heard and any failure to give a notice of time for hearing on defendant's refiled motion to dismiss plaintiff's petition was waived by joining in presenting, arguing and submitting all motions to the court. Plain- (13—102) tiff further claims that she is entitled to judgment on the theory that the admissions made by defendant by filing its motion to dismiss the Federal Court civil rights petition are conclusive against it in this case. In other words, plaintiff claims that admis-

sions in one case by filing a motion to dismiss, for the purpose of obtaining a determination of whether a cause of action was stated, are to be considered as admitting all the facts alleged in the dismissed petition, for the purpose of deciding that a party is entitled to judgment on the merits, in another separate and different case. It is sufficent to say that this is not and never has been the law in this state. (See *Leone* v. *Bilyeu,* Mo. App., 231 S. W. (2d) 265; 41 Am. Jur. 459, Sec. 239; 71 C.J.S. 533, Sec. 261.) Plaintiff also says the will of John Moffett, made when he was a bachelor, was not revoked by his marriage and death without children being born, citing *Shorten* v. *Judd,* 60 Kan. 73, 55 Pac. 286; and *Vanek* v. *Vanek,* 104 Kan. 624, 180 Pac. 240. Therefore, plaintiff says John Moffett's widow misappropriated the interest of Thomas Moffett in the Kansas land; and that defendant is responsible for this, because it advised her she could elect to reject the will. However, the Supreme Court of Kansas decided the question of the interests of the parties in the cases hereinabove cited and that is now conclusive on that question. If that decision was incorrect, the facts stated do not show that it was the result of extrinsic fraud. Furthermore, plaintiff is wrong about the meaning of the Vanek case (which did not involve real estate) because the court said therein: "the reason why the mere marriage of the testator did not at common law revoke the will was because the widow's dower gave her sufficient protection against the effect of any will of her husband, whenever made, and the force of this consideration is not impaired by the abolishment of dower, where a right of substantially equal value is substituted for it." (See 17 Amer. Jur. 746, Sec. 92; 57 Am Jur. 364, (14—103) Sec. 526; Sec's. 22-108, 22-117, 22-127 RSKan. 1923.) Thus the Vanek case does not hold that, under the law of

Kansas, a widow has no interest in the real estate of her deceased husband under these circumstances or that her rights depend on any theory of revocation.

The judgment is affirmed.

Laurance M. Hyde, Judge
All concur
(15—104)

In the Supreme Court of Missouri

Division Number One.

September 1955 Session.

Louise McGrew Moffett, as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased, Appellant, vs. Commerce Trust Company, a Corporation, Respondent.	No. 44,091

On Motions for Rehearing, to Transfer to Banc and for Stay Order.

Plaintiff reargues most of the original contentions made in her brief and also claims that material allegations of fact have been overlooked. Plaintiff misconstrues the opinion as stating that all actions ever commenced between the parties were successfully terminated in favor of the estates represented by defendant. We, of course, referred to the cases finally determined between the parties which we had cited in the opinion, *supra.* After making that statement we referred, *infra,* to the fourteen

other suits listed by plaintiff and noted that one of them was still pending in the Circuit Court of Jackson County. It is shown that four of these cases are Probate Court claims in Kansas, one of which was alleged to be the identical claim still being litigated in the Circuit Court of Jackson County.

Plaintiff also says it is alleged in paragraphs 67 to 72 of Count One that the claims made in all of the actions listed as pend- (176) ing were settled before they were ever instituted; that defendant knew of this settlement; and that the actions were not brought in good faith but for the ulterior purpose of obtaining judgments for non-existing debts. It is true that this part of the petition alleged that the members of the various partnerships for several years prior to January 1, 1927, engaged in negotiations to settle disputes between them as to the correctness of their accounts and that as of that date agreed upon a settlement. However, it is stated that payments were to be made by L. B. Andrews and J. C. Lewis to John Moffett and Thomas Moffett, and it is also stated that before these payments were completed John Moffett died. Furthermore, as stated in the present motion, "Moffett Brothers partnership estate is not included in the settlement and compromise described in paragraphs 67 to 72 of Count One." The motion says this was "because the brothers John and Tom Moffett were the only members of said partnership and they never had any controversies over their business relations." Nevertheless, the petition shows that in the Harper County, Kansas, case, Thomas Moffett, and two of the partnership estates in which he was interested were found to be indebted to John Moffett. It is again vigorously argued that this judgment was void, but we hold that the facts stated in the petition do not show it to be void for the reasons

stated in our opinion and in the other cases cited in which it was attacked.

As to the actions still pending, plaintiff's argument of lack of good faith in attempting to get judgments indicates a situation more in the nature of malicious prosecution than abuse of process. Malicious prosecution, of course, cannot be maintained because these actions have not been determined in plaintiff's favor. This contention of plaintiff really is wrongful initiation of civil proceedings, which we pointed out in the opinion is not abuse of process as stated in Restatement of Torts, comment under Section 682, from which we quoted. The institution of vexatious civil suits known to be (2—177) groundless is governed by substantially the same rules as malicious prosecution of criminal proceedings. (Prosser on Torts, 885, Sec. 97; See also *Weber* v. *Strobel,* Mo. Sup., 225 Mo. 925, 927-928 and cases cited; and see distinction made between malicious use and malicious abuse of process, 50 C.J. 612, Sec. 372, p. 622, Sec. 396; 72 C.J.S. 1188, Sec. 119, p. 1195, Sec. 120c.) The case of *Goler* v. *Zaporanik,* (Sask.), 1 Dom. L. R. 34 was not an action for abuse of process but was instead, a proceeding to quash a writ wrongfully issued to collect a mortgage which had been paid. It is not in point on the decisive issue herein. The allegations relied on in plaintiff's motions are not sufficient to state a cause of action of malicious prosecution and we have explained in the opinion why they do not show a cause of action for abuse of process, which is plaintiff's theory of the case.

Plaintiff says in any event, a Federal question is presented which necessitates transfer to *banc.* However, we do not find any real Federal questions in the case. Plaintiff bases this claim on the contention that defendant's motion to dismiss the civil rights suit in the United States

District Court, and that court's action thereon, admitted and adjudged the facts "to constitute the basis of said judgment of dismissal and its affirmance cannot be controverted in this case by Commerce Trust Company—estopped, as it is, by said admissions and adjudications." Plaintiff also says "the Federal Court based its decision and judgment upon the ground that, under the facts admitted by the motion to dismiss, the Federal Court could grant no relief, but that the State court could." The first part of that statement is correct, but plaintiff is mistaken in saying that the Federal court did or ever undertook to decide what the State court could do or to decide "that the facts alleged stated a cause of action under the state law," as plaintiff claims. In the opinion of the United States Court of Appeals (187 Fed. (2d), l. c. 249), it is said: "The only question presented on this appeal (3—178) is the sufficiency of the complaint." (See also 87 Fed. Sup., l. c. 443.) Thus it is apparent that no Federal question is presented.

Plaintiff's request to file and have considered depositions in the case now pending in the Circuit Court of Jackson County must be denied. There is no authority for considering them on the issue involved herein of whether plaintiff's petition states a claim upon which relief can be granted. Likewise, because that is the issue involved, there is no reason for an order to stay this decision.

All motions are overruled.

Laurance M. Hyde, Judge.
All concur.

And thereafter and on the 11th day of July, 1955, the following further proceedings were had and entered of record in said cause, to-wit:

Louise McGrew Moffett, as an individual and Executrix of the Estate of Thomas S. Moffett, Deceased, Appellant,

vs.

Commerce Trust Company, a corporation, Respondent.

Appeal from the Circuit Court of Jackson County

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution. (Opinion filed.)

5/7

Office - Supreme Court
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HAROLD B. WILLEY,

No. 683

In the Supreme Court of the United States

October Term, 1955.

LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of THOMAS S. MOFFETT, Deceased, *Petitioner,*

vs.

COMMERCE TRUST COMPANY, a Corporation, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court of the United States

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LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of THOMAS S. MOFFETT, Deceased, *Petitioner,*

vs.

COMMERCE TRUST COMPANY, a Corporation, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

No. 683.

STATEMENT.

This Petition for Writ of Certiorari seeks to review a final judgment of the Supreme Court of Missouri denying petitioner's appeal from a judgment of dismissal in her unsuccessful action, which is a mere restatement of the numerous previous actions filed for the same alleged cause over a period of the last thirty years. All of such petitions alleged conspiracy of respondent in the maintaining of accounting actions against her husband or herself in her representative capacity as Executrix of her

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husband's estate. All of such accounting actions are alleged to have been unlawful, improper and a part of the conspiracy to deprive her of her property rights in her husband's estate.

The actions by respondent were brought in compliance with its duty under the laws of the State of Missouri requiring it in its representative capacity to enforce the claims against either the petitioner or her predecessor on behalf of whom she is now acting as Executrix. These suits and claims were brought by respondent in its capacity as Executor *De Bonis Non* of the Estate of John Moffett, a brother and partner of petitioner's predecessor, Thomas S. Moffett, and as Administrator of Moffett Brothers, and Moffett Brothers and Andrews Partnership Estates.

This petition, now clothed with Docket Number 683, in this Court, has a lengthy, if undistinguished, history in this and other courts. It was last reviewed by this Court and certiorari denied on October 8, 1951, reported at 342 U. S. 818.

The particular action to which this petition relates was instituted in the Circuit Court of Jackson County, Missouri, at Independence, on February 25, 1952. Thereafter, plaintiff petitioner filed an amended petition in another division of the court at Kansas City. On August 29, 1952, respondent filed a motion to dismiss such amended petition. The matter was continued from time to time and was ultimately argued and taken under advisement. On October 22, 1953, the Court sustained respondent's motion and dismissed the action with prejudice (R. 423). From this judgment of dismissal, an appeal was taken to the Supreme Court of Missouri and there judgment of dismissal was affirmed as in previous cases alleging the same grievances.

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The petition is based on two counts, the second largely a repetition of the first (R. 3, 53). The gist of the allegations is that every judgment obtained by respondent in its representative capacity was upon a fictitious claim despite the fact that courts of competent jurisdiction rendered final judgments thereon in favor of respondent. The following is a narrative account of the facts concerning the litigation.

On February 21, 1921, John Moffett had executed a will naming his brother, Thomas S. Moffett, as Executor (R. 5). The instant petitioner is successor in interest to Thomas S. Moffett, her husband, now deceased. The will of John Moffett provided that in event of death, inability or refusal of his brother, Thomas S. Moffett, to act as Executor, Commerce Trust Company, the respondent herein, should become Executor. The acts complained of in this action were performed by Commerce Trust Company in its capacity as Executor of such estate (R. 10) and Administrator of partnership estates involving petitioner's predecessor (Exhibit 1, R. 10).

On February 22, 1921, John Moffett married Helen Mustard. John Moffett died on August 23, 1927, and his widow subsequently married Orlin A. Weede, since deceased (R. 27). On August 29, 1927, the Probate Court of Jackson County appointed Thomas S. Moffett Executor of the Estate of John Moffett without bond, and he began administration of the estate of John Moffett.

At the time of the death of John Moffett, he was a member of a partnership known as Moffett Brothers, which consisted of John Moffett and Thomas S. Moffett; of another partnership known as Moffett Brothers and Andrews, consisting of John Moffett, Thomas S. Moffett and L. B. Andrews; of another partnership known as Moffett Brothers Cattle, Land and Lumber Company,

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consisting of John Moffett, Thomas S. Moffett, Joseph W. Moffett and Renwick J. Moffett. Thomas S. Moffett was additionally a member of a partnership known as Andrews, Lewis and Moffett, consisting of himself, L. B. Andrews and J. C. Lewis. These partnerships and the individuals composing them had countless dealings between them on credit, entered in account books, which accounts were infrequently adjusted. The transactions between the members of the partnerships and between the partnerships themselves were recorded in account books known as the Journal and Ledger of Moffett Brothers and Andrews (R. 27-45).

Thomas S. Moffett was removed as Executor of the Estate of John Moffett on November 7, 1928, by order of the Jackson County Probate Court acting through a special judge, for his failure to perform his duties as required by law, and for conflict of interest between Thomas S. Moffett as an individual and in his representative capacity administering the estate of John Moffett and the partnership estates in which John Moffett was interested (R. 7). His removal was brought about by the application of Helen M. Weede, the remarried widow of John Moffett. Thereafter, on November 28, 1928, the respondent, Commerce Trust Company, was issued Letters Testamentary *De Bonis Non* on the Estate of John Moffett in accordance with the directions of the will.

Section 885, R. S. Mo., 1919, provided that if a surviving partner neglected to give bond as required within thirty days after granting of letters on the estate of a deceased partner, the Executor for the deceased partner should give additional bond and administer partnership assets. This was done by respondent, Commerce Trust Company, as Executor of the Estate of John Moffett, and in such capacity respondent was ordered to take charge of assets of

the partnership estates of Moffett Brothers and Andrews, and Moffett Brothers, and thereby was empowered to collect all debts due these estates (R. 10). The respondent, Commerce Trust Company, then proceeded to enforce claims of the individual and partnership estates against Thomas S. Moffett, husband of the petitioner, during his lifetime, and subsequently against the petitioner herein as his successor, all of such claims being based upon valid and established book accounts (Exhibit 1, R. 9). The enforcement of these claims in compliance with respondent's duty as Administrator and Executor is the source of petitioner's alleged grievance against respondent.

Examination of the prior decisions in this and related actions, which this Court may judicially notice, indicates that the book accounts upon which the claims were based were kept in a common office in Kansas City, Missouri. They showed the amount due from Moffett Brothers to John Moffett; the amount due from Moffett Brothers and Andrews to John Moffett; the amount due from Moffett Brothers and Andrews to Moffett Brothers; the amount due from Andrews, Lewis and Moffett to Moffett Brothers and Andrews; the amount due from Moffett Brothers Cattle Land and Lumber Company to Moffett Brothers; the amount due from Thomas S. Moffett to Moffett Brothers; and the amount due from Thomas S. Moffett to Moffett Brothers and Andrews Commission Company. The respondent, Commerce Trust Company, as Administrator and Executor of the estates, did what the law requires in enforcing these claims against Thomas S. Moffett and later against his estate. Enforcement of these claims resulted in the "14 groundless and fictitious suits and claims" referred to by petitioner in her amended petition (R. 13). The last of these was filed December 23, 1931.

August 15, 1929, Thomas S. Moffett filed in the District Court of Harper County, Kansas, an action to partition Moffett Brothers partnership assets in Kansas without an accounting or an adjustment of the rights and liabilities of all parties interested therein. The respondent, Commerce Trust Company, as Executor *De Bonis Non* of the Estate of John Moffett, Deceased, and as Administrator of Moffett Brothers, a partnership estate, was compelled to intervene for the purpose of securing an accounting before distribution of the partnership assets (R. 12). It was held entitled to such an accounting by the Supreme Court of Kansas in the decision of *Thomas S. Moffett, appellant,* v. *Helen Moffett and Commerce Trust Company, Executor, etc.,* reported at 131 Kan. 582, 292 Pac. 947.

On July 24, 1930, this respondent, on behalf of the John Moffett estate and the Moffett Brothers partnership estate, filed petitions in the District Court of Kansas praying for an accounting. On June 15, 1931, the ancillary administrator of the John Moffett estate in Kansas also intervened, praying for an accounting. On December 22, 1930, Thomas S. Moffett died and on February 14, 1931, the cause was revived in the name of Grace Torrance Clark, Administratrix with Will Annexed of the Estate of Thomas S. Moffett, and petitioner as sole beneficiary of Thomas S. Moffett.

On January 13, 1932, the Kansas District Court in Harper County, the forum which Thomas S. Moffett chose during his lifetime, rendered judgment in the partition accounting suit in favor of Robbins, Ancillary Administrator of the Estate of John Moffett, against the Moffett Brothers partnership estate in the sum of $143,829.96 (Exhibit 1, R. 10, 11). The court rendered judgment in favor of respondent as Executor of the Estate of John Moffett against the estate of Thomas S. Moffett in the

sum of $27,399.25. The court rendered judgment in favor of respondent as Administrator of Moffett Brothers partnership estate against the Moffett Brothers Cattle, Land and Lumber Company in the sum of $101,228.06. Grace Torrance Clark, as Ancillary Administratrix and petitioner as sole beneficiary of Thomas S. Moffett, appealed from the judgments to the Supreme Court of Kansas, where the judgments were affirmed. This case is reported as *Clark* v. *Moffett,* 136 Kan. 711, 18 P. (2d) 555. Mrs. Clark and the petitioner in this action then filed in the Supreme Court of the United States a petition for certiorari which was denied; *Moffett* v. *Moffett,* 283 U. S. 826 (R. 336 *et seq.*).

The petitioner, as Executrix, and Grace Torrance Clark, her sister, as Ancillary Administratrix, then instituted suit in the United States District Court for Kansas against R. O. Robbins, Ancillary Administrator of the Estate of John Moffett, to enjoin the enforcement of the judgment rendered in the Harper County, Kansas, suit. This suit for injunctive relief was dismissed by United States District Judge Hopkins on September 4, 1935; *Moffett* v. *Robbins,* 14 Fed. Supp. 602.

The petitioner and Mrs. Clark appealed from this judgment of the United States District Court to the United States Court of Appeals for the 10th Circuit, where the dismissal by the District Court was sustained; *Moffett* v. *Robbins,* 81 F. (2d) 431. Petitioner thereupon filed a petition for certiorari in this Court which was denied; *Moffett* v. *Robbins,* 298 U. S. 675.

The petitioner next filed her first petition for damages in the Circuit Court of Jackson County for the same alleged conspiracy of this respondent and others, as is complained about here. This prior action went to judgment of dismissal with prejudice in favor of this and other

respondents on third demurrer to petitioner's fifth amended petition filed December 30, 1944. Judgment of dismissal was entered in the Circuit Court of Jackson County, Missouri. The petitioner appealed from the judgment to the Supreme Court of Missouri which sustained the judgment of the trial court in its dismissal of the action; *Moffett* v. *Commerce Trust Company,* 354 Mo. 1098, 193 S. W. (2d) 588 (48). The petitioner appealed from that decision to the Supreme Court of the United States, and this Court dismissed the appeal because there was *NO FEDERAL QUESTION INVOLVED; Louise McGrew Moffett etc.* v. *Commerce Trust Company,* 329 U. S. 669.

On February 8, 1947, following the action of this Court, this same petitioner again individually and as Executrix filed the same petition alleging the same grievances against this respondent and others in the United States District Court for the Western District of Missouri (R. 224½ *et seq.*). The allegations were substantially the same and the nature of the action was again for damages for alleged conspiracy for having maintained the same suits or having obtained the same final judgments against the estate of which she was Executrix, which cases have heretofore been dealt with in this statement. The decisions favorable to respondent thereon were by opinion of United States District Judge Reeves, sustaining a motion to dismiss and entering a judgment of dismissal against petitioner; *Moffett* v. *Commerce Trust Company et al.,* 75 Fed. Supp. 303.

The Court thereafter granted leave to petitioner to file a second amended complaint, which petitioner did, again reiterating the grievances alleged here. The Court again sustained respondent's motion to dismiss and entered a judgment of dismissal against petitioner; *Moffett* v. *Commerce Trust Company et al.,* 87 Fed. Supp. 438. From the

order and judgment dismissing the action, petitioner appealed to the United States Court of Appeals for the 8th Circuit. That Court affirmed the judgment of dismissal entered against petitioner by the District Court; *Moffett* v. *Commerce Trust Company et al.*, 187 F. (2d) 242. The petitioner then applied to this Court for writ of certiorari which was denied; *Moffett* v. *Commerce Trust Company, et al.*, 342 U. S. 818.

We have made an earnest effort to mention all the litigation carried on by petitioner, reducing our mention of such litigation material to this petition to the barest possible summary. There is pending in the Circuit Court of Jackson County, Missouri, an action for accounting by Commerce Trust Company as Administrator of the Partnership Estate of Moffett Brothers and Andrews against the Partnership Estate of Andrews, Lewis and Moffett and its successors, including this petitioner. The existence and pendency of such suit was alleged in this action by petitioner. The allegations regarding such pendency, however, do not indicate any right of action against respondent, as is indicated in the opinion of the Supreme Court of Missouri sought to be reviewed here.

From this resume of the preceding litigation, it is apparent that this litigation is instituted and maintained against respondent and the suits carried on because of petitioner's grievance at the fact that suits were instituted against the Thomas S. Moffett Estate and against petitioner in her capacity as a representative thereof and successor to Thomas S. Moffett. Respondent was compelled under the law to bring the actions by reason of its representative capacity either as Executor or Administrator. The only notable feature of the present action is that all of the respondent's alleged co-conspirators have been relieved of the burden of this lengthy litigation and have not

been joined in this action. Petitioner has last proceeded against respondent Commerce Trust Company alone.

Every grievance and complaint now alleged and contended for by the petitioner has been passed upon and denied by this and other Courts previously having jurisdiction over this controversy. The gist of this action is that respondent may not, though compelled by statutory law, sue in an administrative capacity or pursue an accounting action against petitioner to final judgment without in turn being sued individually for damages for the maintenance of "groundless and fictitious suits." The Court will observe from examination of the decisions in the prior actions that petitioner could have demonstrated and established before the Courts rendering such judgments that such actions were "groundless and fictitious," if such were true, but petitioner never raised or established such an issue.

This statement is an effort to lay before the Court an accurate record of what has transpired before. We urge that the Court take into account in its deliberations both the limited amount of factual matter contained in the transcript and judicially notice its own prior decisions and consider the decisions of other lower courts rejecting petitioner's claims, which decisions are frequently adverted to in the transcript.

We could say many things about the pending action and the lack of merit of this petition, but it has been better previously said by the Supreme Court of Missouri on February 11, 1946, in *Moffett* v. *Commerce Trust Company,* 354 Mo. 1098, 193 S. W. (2d) 588, wherein the Court states:

> "Judge Ridge sustained the demurrers on the sole ground of misjoinder of parties, but the demurrers also attacked the petition for * * * failure to state a

cause of action. We think the reason assigned by the trial court is sufficient, but his ruling can be sustained on the other grounds mentioned."

* * * * * * *

"Appellants have not been denied due process. They have not only had their day in court, but their months and years."

ARGUMENT.

The respondent has many times responded to the same reiteration of this previously adjudicated claim and is tired of so responding. It is likewise possible that this Court is tired of adjudicating this claim. All of the things complained of in the petition upon which the instant decision and opinion of the Supreme Court of Missouri unfavorable to the petitioner herein is based, were previously complained of or perhaps we should say continously complained of through the years in the decisions reviewed by this Court on previous denials of petitions for writ of certiorari in the following cases.

Clark, et al., v. *Moffett, et al. (Commerce Trust Company, et al., Intervcners)*, 136 Kans. 711, 18 Pac. (2d) 555, 283 U. S. 826 (cert. den.).

Moffett v. *Commerce Trust Company, et al.*, 75 F. Supp. 303, 87 F. Supp. 438, 187 F. (2d) 242, 342 U. S. 818 (cert. den.).

Clark v. *Moffett*, 136 Kan. 711, 18 Pac. (2d) 555, 283 U. S. 826 (cert. den.)

Moffett v. *Commerce Trust Company*, 75 F. Supp. 303, 87 F. Supp. 438, 187 F. (2d) 242, 342 U. S. 818 (cert. den.).

We have heretofore endeavored to outline as briefly as possible the issues involved, if any, in the Petition to this Court for the Writ of Certiorari. Our lack of brevity in the statement is due to the fact that this matter has been litigated and relitigated for a period of approximately thirty years and the accumulation of decisions adverse to petitioner is lengthy.

The only way in which petitioner could be before this Court is to seek review to be granted by the Court where

there are special and important reasons therefor under Rule 19 of the Court Rules. There are no special or important reasons which could incline the Court to grant a review on the Petition for the writ. The Supreme Court of Missouri decided there was no Federal question of consequence involved not theretofore determined by this Court or not in accord with applicable decisions of this Court. This can be firmly established by examination of the foregoing decisions of this Court denying the previous Petitions for Writ of Certiorari on the reiterated issues.

That there is no ground for jurisdiction of this Court under Rule 19 is emphasized by the fact that the case has come up here in both ways under both Subparagraphs (a) and (b) of the Rule. Otherwise stated, it has been here before from the Supreme Court of Missouri and from the United States District Court for the Western District of Missouri by way of the United States Court of Appeals for the 8th Circuit.

We have carefully examined petitioner's stated reasons for granting the writ, and decisions cited in support thereof. We find therein no decisions that are as cogent or decisive as the previous decisions in the same matter upon which this Court has previously denied writ of certiorari. A review of the decisions cited by petitioner would in our opinion not be helpful in aiding the Court in its approach to denying the petition presently under consideration.

As we briefed this matter in the court below, we stated that it "partakes of the qualities of Tennyson's Brook * * * this and related matters have been litigated by appellant for approximately thirty years." All actions stating or restating the attempted-to-be-stated cause of action herein have been favorably adjudicated to this re-

spondent and firmly adjudicated against the petitioner. The only distinct feature about the present action adjudicated in favor of this respondent is that respondent Commerce Trust Company is the lone surviving defendant or respondent. The remaining respondents have been relieved of the burden of this action by death or voluntary acquittance and lack of desire of the petitioner to pursue them further.

It will be readily observed by this Court from the briefs and the record that petitioner filed this same action through a series of five amended petitions up to the year 1944, all of which were dismissed and resulted in final judgment with certiorari denied in this Court, because there was *No Federal Question Involved,* such decision being *Louise McGrew Moffett etc.* v. *Commerce Trust Company,* 329 U. S. 669. This was unsatisfactory to the petitioner and later resulted in the filing of the same petition resulting in a judgment of dismissal against petitioner and subsequent affirmance thereof in *Moffett* v. *Commerce Trust Company, et al.,* 75 Fed. Supp. 303; *Moffett* v. *Commerce Trust Company, et al.,* 87 Fed. Supp. 438; *Moffett* v. *Commerce Trust Company, et al.,* 187 Fed. (2d) 242, certiorari denied for the previously expressed reason of *No Federal Question* in *Moffett* v. *Commerce Trust Company, et al.,* 342 U. S. 818.

The persistence of petitioner in the filing of nine petitions for the same alleged grievance is appalling and exhausting, and is obviously a maneuver to prevent respondent from enforcing, as it is required to do under the law, the just claims owed by petitioner and her predecessor to the probate estates involving her husband's brother, John Moffett, for whom respondent acts. It is accurate to say that respondent has nothing to gain in the enforcement of such claims except to perform a duty imposed upon it by

law. It is problematical as to how many more times this Court must tell petitioner that there is *No Federal Question Involved* and that the decisions of the lower courts have not been decided in a way that does not accord with applicable decisions of this Court.

All of the matters here complained of by petitioner have been successively adjudicated adversely to petitioner in each of the following cases:

Moffett v. *Moffett,* 131 Kan. 582, 292 Pac. 947.
Clark v. *Moffett,* 136 Kan. 711, 18 Pac. (2d) 555, 283 U. S. 826, cert. den.
Moffett v. *Robbins,* 14 F. Supp. 602.
Moffett v. *Robbins,* 81 F. (2d) 431.
Moffett v. *Commerce Trust Company,* 354 Mo. 1098, 193 S. W. (2d) 588.
Moffett v. *Commerce Trust Company,* 75 F. Supp. 303, 87 F. Supp. 438, 187 Fed. (2d) 242, 342 U. S. 818, cert. den.

It was ably said by Justice Story in an early decision of this Court, *Ocean Insurance Company* v. *Fields,* 2 Story 59, F. Case No. 10406, that:

> "It is for the public interest and policy to make an end to litigation or, as was pointedly said by a great jurist, 'that suits may not be immortal while men are mortal'."

Speaking of this same attempted-to-be-stated cause of action in the same case that previously came here via the United States District Court and Court of Appeals for the 8th Circuit, it was well said by Judge Reeves of the United States District Court for the Western District of Missouri that:

> "It seems so clear that the plaintiff cannot state a cause of action as to warrant the Court in a dismissal and such order should be made with prejudice against filing another complaint."

We hardly regard it necessary to state that all of the attempted-to-be-stated causes of action are one and the same. The Court can readily determine such from an examination of any of the decisions in this previously adjudicated matter.

One of counsel for respondent, who was charged with the handling of this matter in the courts below, has been charged by the petitioner with being unfamiliar with the case because he had only been counsel of record in this and related cases for some six or eight years. This would obviously make him a novice in this litigation in view of the fact that it has existed in the same or slightly altered form for a period of approximately thirty years.

The counsel for respondent referred to is not attempting to become an expert or to become more familiar with this litigation and the respondent and all of counsel for respondent are in accord in respectfully joining the suggestion that this Petition for Writ of Certiorari should be denied as was done in the previous petitions on this previously adjudicated matter.

Respectfully submitted,

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FILED
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HAROLD B. WILLEY, Clerk

No. 683.

In the Supreme Court of the United States

October Term, 1955.

LOUISE McGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased, *Petitioner*,

vs.

COMMERCE TRUST COMPANY, a Corporation, *Respondent*.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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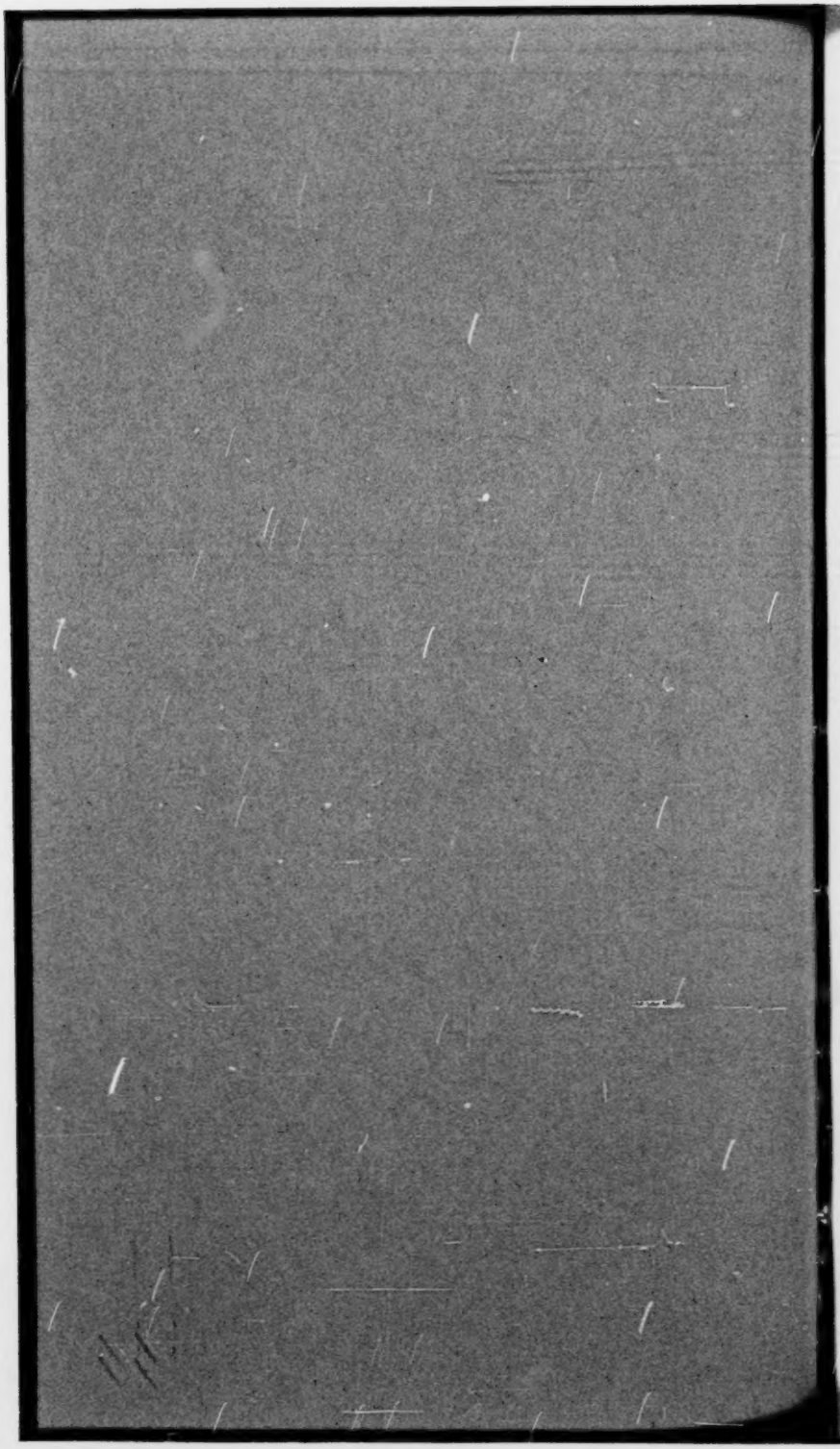

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In the Supreme Court of the United States

October Term, 1955.

LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased, *Petitioner,*

vs.

COMMERCE TRUST COMPANY, a Corporation, *Respondent.*

No. 683.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Respondent's brief in opposition does not aid respondent because its claim that the decision of the Federal court, holding that petitioner was not entitled to a remedy in the Federal court—though decided by the Missouri courts to be *res judicata* against petitioner—is not and could not be *res judicata* against petitioner under the law as declared by this Court and the Missouri Supreme court *en banc*.

Lawlor v. *National Screen Service Corp.*, 349 U. S. 322, 349 U. S., l. c. 329.

Ash Sheep Co. v. *United States*, 252 U. S. 159, l. c. 170.

Troxell v. *Delaware*, L. & W. R. Co., 227 U. S. 434.
Magnolia Petroleum Co. v. *Hunt*, 320 U. S., l. c. 444.
Loudenslager v. *Gorum*, 355 Mo. 181, l. c. 188.

Respondent was not a party to the same case reported in 14 F. Supp. 602 and 81 F. 2d 431, nor was Mrs. Clark, referred to on page 7 of respondent's brief. So said decisions could not be *res judicata* in favor of respondent. *Old Dominion Copper Mining Co.*, 225 U. S. 110; *United States* v. *Pink*, 315 U. S. 203, l. c. 216.

Respondent's many claims that the issues in the state court had been theretofore adjudicated and were *res judicata* is contradicted by the opinion of the Supreme Court of Missouri (Vol. III, p. 94), citing three previous cases by that court, *Gordon* v. *Burris*, 125 Mo. 39; *State ex rel. Damon* v. *McQuillin*, 246 Mo. 674, *en banc*, and *Gibson* v. *Armour & Co.*, Mo. App., 219 S. W. 152, holding that the decision of the Supreme Court of Missouri in 354 Mo. 1098 was not *res judicata* under a state statute. The decision of the Supreme Court of Missouri, *en banc*, in *Loudenslager* v. *Gorum*, based on three decisions of this Court holding that where a remedy has been denied to a plaintiff because the law of the jurisdiction to which the plaintiff applied does not provide a remedy, the judgment denying same is not *res judicata* of the right to recover in a jurisdiction or under a law which does provide a remedy.

So that there is no *res judicata* in this case, though vociferously asserted by respondent countless times in its reply brief.

And furthermore, its statement on page 10 of its brief that

> "* * * but petitioner never raised or established such an issue,"

with reference to the groundless and fictitious actions contradicts its assertions as to *res judicata*. It follows that if

such issues were not raised in a different action, then the action before the Supreme Court of Missouri and the questions here involved could not be, and cannot be, and are not, *res judicata* against petitioner.

That respondent's brief does not aid this Court and that the author thereof is not familiar with either the facts or applicable law is established by the first two sentences thereof, wherein it states that 30 years before petitioner acknowledged service of its brief in opposition, she had instituted actions seeking the same relief as she sought in her suit filed on February 25, 1952. That is to say, that she was seeking the relief she now seeks some 17 months before John Moffett died, and more than 2 years before respondent caused the entry of an order by the "special" probate judge purporting to appoint it an executor and administrator of Moffett estates.

Respondent's brief on its page 16 asserts that:

> "One of counsel for respondent, who was charged with the handling of this matter in the courts below, has been charged by the petitioner with being unfamiliar with the case because he had been counsel of record in this and related cases for some six or eight years."

Paragraph 25 (Vol. III, p. 118) of the motion for rehearing and to transfer to *banc* points out that when said counsel was arguing said case, the author of the opinion of Division 1 of the Supreme Court of Missouri asked how long these groundless cases had been pending, to which said counsel replied "over 20 years." And when said counsel was asked why they were kept pending for 20 years, stated, "I do not know; I am a new man and do not know" (Vol. III, p. 118).

Petitioner sought to excuse unfounded statements made to the trial court, and to the Supreme Court of Missouri, by said counsel in paragraph 20 (Vol. III, p. 116), stating:

> "Because said counsel had been prosecuting cause No. 339,134 since 1948, appellant believed that he intentionally made said statement. But that the statement to this court that he was a new man in it, did not know why the groundless suits were still pending, perhaps excuses said untrue statement."

On page 386 of Vol. II of the record is the following by said counsel:

> "Now, all these actions have been determined favorably to the Commerce as executor and successor to John Moffett."

Which statement is the basis of the following mis-statement in the first opinion of Division 1 of the Supreme Court of Missouri (Vol. III, p. 108):

> "It is because these actions were successfully terminated, in favor of the estates of which defendant was executor or administrator, that plaintiff claims to have been damaged."

The preceding part of the paragraph in which said statement appears in the opinion shows that said statement was made with reference to the groundless actions described in paragraph 43 of Count I (Vol. I, p. 25) and 25 of Count II (Vol. I, pp. 76-77); and, with reference to which Division 1 of the Supreme Court erroneously stated that petitioner had misconstrued its opinion (Vol. III, p. 176).

The cases referred to, both by respondent and by Division 1 of the Supreme Court of Missouri, were called to the attention of the Court in paragraphs 3 to 7, inclusive

(Vol. III, p. 108), of petitioner's motion for rehearing and to transfer to the Court *en banc*, and resulted in its second opinion (Vol. III, pp. 176-179), admitting that the groundless actions are still pending, were never terminated, and that said groundless actions, as alleged in paragraph 43 of Count I (Vol. I, p. 25) and paragraph 25 of Count II (Vol. I, pp. 76-77), are still pending. And by virtue of the judgment of the Supreme Court of the state to be reviewed herein, must remain forever unlawfully pending unless this Court issues the writ prayed for.

After said groundless cases had been pending for some 12 years, petitioner instituted her first action against respondent and others, reported in *Moffett* v. *Commerce Trust Company*, 354 Mo. 1098. At l. c. 1125, it is said:

> "The original petition with Louise McGrew Moffett as sole plaintiff was filed August 22, 1941."

The action in the Federal court was instituted, as admitted in respondent's brief, on February 8, 1947. These were the only two previous actions ever instituted by petitioner against respondent, or any of the conspirators.

As the opinion admits (Vol. III, p. 94), the judgment in 354 Mo. 1098 was not *res judicata* under the law declared in *Gordon* v. *Burris*, 125 Mo. 39; *State ex rel. Damon* v. *McQuillan*, 246 Mo. 674; *Gibson* v. *Armour & Co.*, Mo. App., 219 S. W. 152.

The action in the Federal court, reported in 75 F. Supp. 303, 87 F. Supp. 438, 187 F. 2d 242, and 342 U. S. 618, 989, was not *res judicata* under the decisions in *Troxell* v. *Delaware, L. & W. R. Co.*, 227 U. S. 434; *Ash Sheep Co.* v. *United States*, 252 U. S. 159, 170; *Ivy* v. *United States*, 84 F. 2d 37, 39 (C. A. 5); *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S., l. c. 444; *Loudenslager* v. *Gorum*, 355 Mo. 181, 188, and *Lawlor* v. *Nat'l Screen Service Corp.* (C. A.

3), 349 U. S. 322. And yet Division 1 of the Supreme Court of Missouri adjudged that the judgment of December 1, 1949, in the Federal court is *res judicata* against petitioner's right to recover. Whereas, it is *res judicata* against any defense respondent might have attempted to present when it exercised its election to file a motion to dismiss, instead of answering, and thereby admitting that it had no defense, as stated in *City of Aurora* v. *West*, 7 Wall. 82, l. c. 98-99.

The foregoing case in 354 Mo. 1098, and that reported in 75 F. Supp. 303, were the only prior cases ever instituted against respondent, or its fellow conspirators, by petitioner. Its brief blames petitioner for the institution of many cases against it, whereas it is the guilty party. It is the individual that instituted some 14 groundless claims and actions seeking in excess of $5,000,000.00 against petitioner and her testator, notwithstanding it knew when it instituted them that they had all been compromised and settled and that they were all groundless. And, as pointed out in the second opinion of Division 1 of the state court (Vol. III, pp. 176-179), they are all still pending, as alleged in paragraph 43 of Count I (Vol. I, p. 25) and paragraph 25 of Count II (Vol. I, pp. 76-77) of petitioner's petition, and as alleged on pages 9 to 14 of the second amended complaint (Exhibit "1," Vol. I, p. 90). So that the quotation on page 15 of respondent's brief from *Ocean Ins. Co.* v. *Fields*, 2 Story 59, F. Cas. No. 10406, that:

> "It is for the public interest and policy to make an end to litigation or, as was pointedly said by a great jurist, 'that suits may not be immortal while men are mortal.' "

applies to respondent's conduct, and not petitioner's.

Respondent has made many misquotations and misstatements in its brief, among which is a charge on its page 4 that Thomas S. Moffett was removed as executor

> "* * * for his failure to perform his duties as required by law, * * *"

The record shows that the void act of the person assuming to act as "special" probate judge was based upon "conflict of interest" between the John Moffett estate and the partnership estates of Moffett Brothers and Moffett Brothers and Andrews, thus stated in 345 Mo. l. c. 745-746:

> "Thomas S. was appointed by the Probate Court of Jackson County as executor of the John Moffett estate on August 29, 1927, and also proceeded, as the sole surviving partner, to administer the partnership estate. August 17, 1928, Helen Moffett, John's widow, commenced proceedings in the probate court to remove Thomas S. as executor of the John Moffett estate on the ground that the interests of the John Moffett estate and the Moffett Brothers estate were conflicting. November 28, 1928, Thomas S. was removed as executor of the John Moffett estate, and the Commerce Trust Company (Kansas City) was appointed administrator *de bonis non* of the estate."

Said conflict was the only ground of removal and not on the ground that the removal was "for failure to perform his duties as required by law" as incorrectly stated by respondent's brief on its page 4.

Respondent's brief in this Court, like the statement made to the trial court and to Division 1 of the Supreme Court of Missouri, does not sustain, but destroys, respondent's contentions.

II.

The admissions in respondent's brief in opposition disprove its claims of *res judicata*, and establish the merit of petitioner's right to the grant.

The admission on pages 8 and 9 of respondent's brief, that the well-pleaded allegations in the complaint in the Federal court (Exhibit "1", Vol I, p. 90) were true, and the adjudication by the Federal court that said allegations were true, operate to make the decision in *The Evergreens* v. *Nunan*, 141 F. 2d 927, controlling. (See *Com'r.* v. *Sunnen*, below.) At l. c. 928 it is said:

> "(3) It is of course well-settled law that a fact, once decided in an earlier suit, is conclusively established between the parties in any later suit, provided it was necessary to the result in the first suit. *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1, 48, 18 S. Ct. 18, 42 L. Ed. 355; *Tait, Collector*, v. *Western Maryland R. Co.*, 289 U. S. 620, 53 S. Ct. 706, 77 L. Ed. 1405. However, a 'fact' may be of two kinds. It may be one of those facts, upon whose combined occurrence the law raises the duty, or the right, in question; or it may be a fact, from whose existence may be rationally inferred the existence of one of the facts upon whose combined occurrence the law raises the duty, or the right. The first kind of fact we shall for convenience call an 'ultimate' fact; the second, a 'mediate datum.' 'Ultimate' facts are those which the law makes the occasion for imposing its sanctions."

Concluding, the court states, l. c. 930-931:

> "(5) Thus, there is a dearth of authority upon the question. The truth appears to be that, so far as we can find, the courts have not had it clearly presented to them, as it is presented to us in the case at bar.

> Being free to decide, and for the reasons we have given, we do not hesitate to hold that, even assuming *arguendo* that 'mediate data' decided in the first suit, conclusively establish facts, 'ultimate' in the second, no fact decided in the first whether 'ultimate' or a 'mediate datum,' conclusively establishes any 'mediate datum' in the second, or anything except a fact 'ultimate' in that suit."

Certiorari in above case was denied, 323 U. S. 720.

This Court in *Commissioner* v. *Sunnen*, 333 U. S. 591, citing *The Evergreens* v. *Nunan*, held that the doctrine of estoppel by judgment applies to tax cases as well as other cases, thus, l. c. 598:

> "But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, *res judicata* is usually and more accurately referred to as estoppel by judgment, or collateral estoppel. See Am. Law Inst. Restatement, Judgments, secs. 68, 69, 70; Scott, 'Collateral Estoppel by Judgment,' 56 Harv. L. Rev. 1."

At l. c. 601 this Court stated:

> "Of course, where a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding even though the cause of action is different. See *The Evergreens* v. *Nunan* (C.C.A. 2d), 141 F. 2d 927, 152 A.L.R. 1187. And if the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change."

Syllabii 3, 4 and 5 in *The Evergreens* v. *Nunan*, more tersely state the applicable principle, which are as follows:

> "3. Judgment
> "A fact, once decided in an earlier suit, is conclusively established between the parties in any later suit, provided it was necessary to the result in the first suit."
> "4. Judgment
> "In ascertaining which facts, of those decided in first suit, are conclusively established, the court in second suit may go beyond the judgment roll."
> "5. Judgment
> "Even if 'mediate data' decided in first suit conclusively establishes facts which are 'ultimate' in second suit, no fact decided in first suit, whether 'ultimate' or a 'mediate datum' conclusively establishes any 'mediate datum' in the second suit or anything except a fact 'ultimate' in that suit."

The Evergreens v. *Nunan*, 141 F. 2d 927, is followed and applied in *Fairmount Aluminum Co.* v. *Commissioner*, 222 F. 2d 622, at l. c. 626-627, wherein the opinion is by Chief Judge Parker (C. A. 4).

Paragraph 28 of Count II (Vol. I, pp. 78-85), together with some other paragraphs, states facts which are perhaps beyond the judgment roll, but show the contentions made by the parties in their briefs and otherwise in the Federal courts. *City of Aurora* v. *West*, 7 Wall. 82, at page 6 of the petition for the writ, quotes the law holding what issues were decided on demurrer.

In 34 C. J., p. 907, Section 1318, it is said:

> "Party Estopped by Judgment in His Favor. A judgment is an estoppel upon a party not only in so far as it decides a question adversely to his claim or contention in the suit in which it is rendered, but where it recognizes or sustains his theory or claim

> it estops him from afterward taking a different position in litigation with the same opponent, even though as to the other party the judgment may be void for want of jurisdiction."

The United States Court of Appeals held, 187 F. 2d l. c. 247, as to petitioner's case, "The protection of such rights and redress for such wrongs was left with the States." Likewise, respondent is estopped from "taking a different position" in this case in the State court, or herein in this Court, from that in the Federal court.

At l. c. 929, The Evergreen opinion cites, followed by the statement:

> "We read Freeman on Judgments, sec. 693, as in accord with these cases."

Freeman on Judgment, 5th Ed., Vol. 2, p. 1465, Section 693 is:

> "Necessary Inference.—Matters which follow by necessary and inevitable inference from an adjudication because the judgment could not have been rendered without determining them are as effectually concluded thereby as though specifically and in terms adjudicated."

As pointed out in *Jackson* v. *Industrial Board,* 280 Ill. 526-534, the judgment sustaining respondent's motion to dismiss—whatever its effect might be in the Federal court, had no effect whatever in the State court as to petitioner's right to recover from respondent—except to estop respondent from making any contention herein different from its contention and admission which was the basis of the adjudication of the truth in the Federal court.

The Supreme Court of Missouri, *en banc*, in *St. Louis* v. *United Railways*, 263 Mo. 387, at l. c. 428, said:

> "'A party who obtains or defeats a judgment by pleading or representing a thing or judgment in one aspect, is estopped from giving it another in a suit founded upon the same subject-matter.' * * *
>
> In the presence of the facts and the precedents in support of same, defendant, by its own attitude, is precluded from any substantial defense to this action."

That petitioner is entitled to a judgment for the amount prayed is established by the decisions in said English and State court cases. And more particularly by the decision in *Jackson* v. *Industrial Board*, 280 Ill. 526-534, as shown by the following from that opinion, as quoted at greater length on pages 60 and 61 of petitioner's main brief in the State court:

> "It is argued by plaintiff in error that notwithstanding the fact that the circuit court by its judgment on the demurrer determined that the deceased was not engaged in interstate commerce and for that reason gave judgment on demurrer, the judgment of the court in that case does not estop plaintiff in error to contend in this proceeding that the deceased was, in fact, engaged in interstate commerce. The court by its judgment in that case determined one question of fact that necessarily, defeated the administratrix in that suit, i.e., that the deceased was not engaged in interstate commerce, and for that reason she could not maintain her suit under the Federal Employers' Liability act. That judgment completely estops plaintiff in error, as well as the administratrix, from contending in any other suit between the same parties that the deceased was injured while employed by the plaintiff in error in interstate commerce. A judgment on demurrer is equally conclusive by way of

estoppel as a verdict finding the same facts followed by a judgment on the verdict, and the facts thus established cannot afterwards be contested between the same parties where the fact is an ultimate fact determining the question of liability. (*Nispel* v. *Paparle*, 74 Ill. 306.)"

The principle thus applied applies herein. For in this case, as in that, the court below held that neither this plaintiff nor that plaintiff could recover under the Federal statutes invoked. And further held that said question in the Jackson case was determined on demurrer, and that both plaintiff and defendant in that case were completely estopped from contending in any other suit between the same parties that deceased was engaged in interstate commerce—i.e., an occupation governed by the Federal law, but that the decision was no bar to a recovery under the State law, as here. This proposition is completely established by the foregoing, and the following from said Jackson opinion:

"Where one has a right of action at common law and also under the statute for the same injury, the bringing of either of said suits is not a bar to the other, and particularly where no recovery has been had under the one or the other. Apparently in this case the administratrix supposed she had a right of action under the Federal Employers' Liability Act, and brought suit under that statute. By the judgment of the court in that case it was determined that she had no such right of action. She then brought her action for compensation under the State law. A suit under a State law and a judgment therein against the plaintiff are no bar to a suit for the same injury under the Federal Employers' Liability Act, where it appears that there could be no recovery under the State law for the injury (*Troxell* v. *Delaware, Lackawanna and Western Railroad Co.*, 33 Sup. Ct. Rep.

> 274). The converse of that proposition is equally true, i.e., that a judgment against plaintiff in a suit brought under the Federal Employers' Liability Act is no bar to an action under a state law for the same injury, where it is determined that the party injured was not engaged or employed in interstate commerce at the time of the injury."

The adjudication by the Federal District Court that the well-pleaded facts in the second amended complaint (Exhibit "1," Vol. I, p. 90), admitted by respondent's motion to dismiss (Vol. II, pp. 91-97), were and are true, and therefore estopped respondent from making any defense to petitioner's petition in the State court, wherein she seeks to recover for the enormous loss sustained by her as the result of respondent's unlawful acts in violation of its assumed fiduciary obligation to her, is certainly a substantial Federal question, caused by the institution of the groundless actions seeking some $5,000,000.00, instituted after respondent knew that they had all been settled, as found in the second opinion of Division 1 of the Supreme Court of Missouri (Vol. III, pp. 176-177) to have been duly alleged and admitted in paragraphs 67 to 72 of Count 1 of petitioner's petition in the State court.

Petitioner has not found that this Court has heretofore determined that question. Respondent's brief omits reference to said question.

But whenever such question has arisen in the English courts or those of the States, it has been determined in the same way as petitioner asked the State court, and now asks this Court, to determine said question.

See *Jackson* v. *Industrial Board,* 280 Ill. 526-534; *Nispel* v. *Laporte,* 74 Ill. 306, 309.

See opinions of Chief Justice Tyndal in *Gregory* v. *Duke of Brunswick,* 134 E. R. 866, 873; same case, 134

E. R. 205, l. c. 1179, and same case, 174 E. R. 696; *Cutler* v. *Wright*, 22 N. Y. Rep. 472, l. c. 478 and 482.

The same principle applies in Missouri. *Goodrich* v. *Rhodes*, 251 S. W. 2d 652, l. c. 654:

> "* * * defendants, by their motion to dismiss, have in effect admitted the amount of the debt."

The absence of a precedent *in this Court* does not authorize it to deny a remedy. In *Steggall* v. *Morris*, 363 Mo. 1224, l. c. 1230, it is said:

> "Lord Mansfield was there quoted as having said, 'The law of England would be an absurd science were it founded upon precedent only.' * * * We rule that the theory of no precedent is not a valid reason for denying a remedy to a person injured."

And so the law of the United States, like that of England, "would be an absurd science were it founded upon precedent only."

The fourth question presented (a), (b) and (c) at pages 4 to 6 of the petition, and the fourth reason for granting the writ at pages 21-23, coupled with the foregoing, presents a most substantial federal question.

Rule 19 of this Court provides that the review on certiorari

> "will be granted only where there are special and important reasons therefor."

Paragraph 1 (a) indicates that the variety of Federal questions above presented constitute a special and important reason for granting the writ, for paragraph (a) provides:

> "Where a state court has decided a federal question of substance not theretofore determined by this court."

If said question has not been determined by this Court, then the question itself is a special and important reason for granting the writ under said Rule 19, and authorizes and evidently requires the issuance of the writ in this case. It follows that respondent's suggestions on pages 12 and 13 of its brief, as to the effect of Rule 19 in this case, is without merit.

The statement in the second opinion of the Supreme Court of Missouri (Vol. III, p. 178) that

> "We do not find any real federal question in the case"

is itself a statement showing that Division 1 of the Supreme Court of Missouri considered all the Federal questions raised in petitioner's petition and in her brief and, after such consideration, assumed to decide that there is no Federal question in the case by holding that the Federal questions so raised were not "real." However, the question as to whether substantial Federal questions were raised is for this Court, and not for the State court, to decide.

As stated in *Angel* v. *Bullington,* 330 U. S. 183-211, at l. c. 188:

> "When an asserted federal right is denied, the sufficiency of the grounds of denial is for this Court to decide. *Titus* v. *Wallick,* 306 U. S. 282, 291, 83 L. ed. 653, 659, 59 S. Ct. 557."

The due process and equal protection clauses of the XIVth Amendment to the United States Constitution are invoked in paragraph 25 of Count II of the petition (Vol. I, pp. 76-77).

III.

Division 1 of the Supreme Court of Missouri decided that the judgment of the Federal court, dismissing the second amended complaint on respondent's motion, was *res judicata* against petitioner's right, decided a most important and substantial Federal question in direct conflict with many decisions of this Court and the highest court of Missouri *en banc*.

Said question is presented in the second reason on page 19 of petition for writ, thus:

> "(2) The decision to be reviewed is in direct conflict with the decision of this court in *Troxell* v. *Delaware, L. & W. R. Co.*, 227 U. S. 434; *Ash Sheep Co.* v. *United States*, 252 U. S. 159; and *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. l. c. 444; and also in conflict with the decision of the highest court of the State of Missouri, same being the court *en banc*, in *Loudenslager* v. *Gorum*, 355 Mo. 181, l. c. 188, wherein the author of the opinions herein cited and quoted from said decisions of this Court in support of his then decision that where a suitor has been denied a remedy in one jurisdiction because it does not afford a remedy for the particular wrong alleged can not by such denial be barred recovery in another jurisdiction which does provide a remedy. Incidentally, the opinion in *Loudenslager* v. *Gorum* was *en banc*, a decision which, under the law declared by that court *en banc* in *State ex rel.* v. *Reynolds*, 278 Mo. 554 at l. c. 558, holds:
>
> > "'So far as concerns the law in principle, however, the decision of the court *en banc* is still the law and is in no wise modified or affected by a conflicting division decision.'"

Respondent's brief, page 16, twice asserts that the writ should be denied in "this previously adjudicated matter." In other words, respondent claims that petitioner's right

to recover for the loss resulting from the overt acts pursuant to the original conspiracy, since December 1, 1949, is barred by the application of the *res judicata* rule to the Federal court judgment of that state. But this Court in *Lawlor* v. *Nat'l Screen Service Co.*, 349 U. S. 322, at l. c. 328, ruled:

> "While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case."

The part of the foregoing quotation before the comma is merely made to identify the prior judgment. But said identification does not operate to give the effect of *res judicata* to the judgment of the Federal court herein on December 1, 1949, because that judgment was based upon the ground that petitioner could not recover under the Civil Rights Act in the Federal court, but that she could in the State court. And the decisions of this Court in *Troxell* v. *Delaware, L. & W. Ry. Co.*, 227 U. S. 434; *Ash Sheep Co.* v. *United States*, 252 U. S. 159, 170; *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S., l. c. 444, and *Loudenslager* v. *Gorum*, 355 Mo. 181, l. c. 188, expressly hold that petitioner can recover for the loss occasioned prior to December 1, 1949, because the Federal court could not give a remedy and the Missouri court could.

While the judgment of the Federal court, in holding that petitioner had no right to recover under the Federal Civil Rights Act, may have been *res judicata* as to petitioner's right to institute a new suit in the Federal court under the same law, yet said rule could have no application in the State court, where recovery is sought under a law which provides a remedy, in accordance with the principle

stated in *Ash Sheep Co.* v. *United States,* 252 U. S. 159, l. c. 170:

> "Rejection of a claim because pursued in an action in which it cannot be entertained does not constitute an estoppel against the pursuit of the same right in an appropriate proceeding. We agree with the court of appeals that 'a judgment is not conclusive of any question which, from the nature of the case or the form of action, could not have been adjudicated in the case in which it was rendered.' "

The law there declared is made part of the Missouri law by the opinion of the author of the opinions herein in the Missouri State court *en banc* in *Loudenslager* v. *Gorum,* 355 Mo. 181, l. c. 188.

The last part of said paragraph (a) of Rule 19 authorizes or requires the issuance of the writ prayed for under the facts and authorities stated in Point III. The part of said Rule 19, subparagraph (a) is as follows:

> "(a) Where a state court has decided a federal question of substance * * * in a way probably not in accord with applicable decisions of this court."

The decision in Division 1 of the Supreme Court of Missouri to be reviewed herein has decided the Federal question described and embodied in the foregoing point and authority, not only in a way probably not in accord with applicable decisions of this Court, but, to an absolute certainty, has decided said Federal question in direct conflict with said applicable decisions of this Court. And so the writ is authorized by said quoted provisions of Rule 19 of this Court, the contentions in respondent's brief in opposition on page 13 thereof to the contrary notwithstanding.

And so this Court has jurisdiction to issue its writ of certiorari in this very important case to settle the very important issues therein. And that it has power and jurisdiction so to do is established by its decision in *Williams v. Bruffy*, 102 U. S. 248, l. c. 255:

> "Whenever the highest court of a state, by any form of decision, affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a federal question, will, upon a proper proceeding, attach."

The facts in this action establish that it was not barred by the five-year statute of limitations, Section 516.120, R. S. Mo., 1949, for the overt acts, pursuant to the conspiracy, are being committed to this hour.

Conclusion.

It necessarily follows that this Honorable Court, in the exercise of its judicial discretion, should grant the writ of certiorari prayed for.

Respectfully submitted,

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Office - Supreme Court, U.
FILED
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HAROLD B. WILLEY, Clerk

No. 683.

In the Supreme Court of the United States

October Term, 1955.

LOUISE McGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, *Petitioner*,

vs.

COMMERCE TRUST COMPANY, a Corporation, *Respondent*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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COMMERCE TRUST COMPANY, a Corporation, *Respondent.*

No. 683.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that this Court grant rehearing of its order of March 26, 1956, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of Division No. 1 of the Supreme Court of Missouri in the above entitled case as prayed for in the petition filed February 11, 1956, herein.

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REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. On December 1, 1949, a Federal Court dismissed petitioner's case stated in a second amended complaint wherein relief was sought under the Federal Civil Rights Acts for the loss caused by the overt acts pursuant to a conspiracy. On February 25, 1952, petitioner instituted a new action seeking recovery for the loss caused by the same kind of overt acts pursuant to said old conspiracy, both after and before December 1, 1949. There was no instance in which "on this very set of facts" any case had been decided before June 6, 1955 as stated in (*Lawler and Pantzer, Co-partners,* v. *National Screen Service Corporation,* 111 Fed. 2d 934, l. c. 936). On June 6, 1955, this Court in the same entitled cause, 349 U.S. 322, reversed said Federal Court decision and decided that though the Federal Court decision was *res judicata* as to prior acts, it was not as to the loss caused by like overt acts after the first decision, and that the plaintiff was entitled to recover for the resulting loss.

Petitioner on July 26, 1955, filed her motion for rehearing (Vol. III, pp. 106-125) and to transfer to *banc,* wherein she prayed said court to grant her a rehearing for the reason that (Vol. III, p. 107):

> "(1) This Court has decided that the groundless actions which were pending when appellant's petition was filed, as shown by paragraph 25 of Count II, and paragraph 43 of Count I, of the petition, are such that, under the law of Missouri, defendant is entitled to keep pending forever—as it has for over 25 years—and that for said reason the remnant of the estate of appellant's testator can never be distributed to her, and that is proper for defendant to continue to commit overt acts, pursuant to said con-

spiracy to continue to deprive this appellant of the property devised to her by her husband, with the endorsement and approval of this Court.

"(2) The Supreme Court of the United States, in an opinion by Chief Justice Warren delivered June 6, 1955, in direct conflict with the decision of this Court in this case, expressly decided that such wrong cannot be done in this civilized land. In *Lawlor and Pantzer, Co-partners,* v. *National Screen Service Corporation,* 99 Law Ed. (Advance Sheet 671), Regular Ed. 1122, said opinion holds that where an action based on conspiracy was dismissed with prejudice, and where the conspiracy continued after the dismissal of the first suit with prejudice—overt acts causing injury continued to be committed, pursuant to the old conspiracy, authorized a recovery for damage caused by the additional overt acts after dismissal, and that the first decision is no bar to the second suit. In the opinion it is said, l. c. 675:

> " * both suits involved 'essentially the same course of wrongful conduct' * "

The Court also held that *res judicata,* if given the effect claimed for it there, and here, l. c. 676:

> " * would in effect confer on them a partial immunity from civil liability for future violations.
> ****

Said motion for rehearing alleges in paragraph (35):

"(35) By said rulings of this Court, and the trial court, and their failure to rule as requested by this appellant, this appellant has been denied, by the State of Missouri, through this Court and the trial court, the protection of Section 1 of Article XIV of the Constitution of the United States, providing:

> 'No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state

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> deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

Petitioner raised said federal questions at the earliest opportunity after the change of the law by this Court's decision on June 6, 1955, and included same and the ruling of the state court in the certified copy of the record filed herein (Vol. III, pp. 106-125). But the question as to whether or not the state supreme court had decided the federal question resulting from said decision by this Court of June 6, 1955, was not presented to this court in petitioner's petition for certiorari as shown by the first question presented on page 3 of said petition as follows:

> "(1) Whether or not the judgment to be reviewed, deciding that there can be no recovery for loss resulting from overt acts pursuant to the original conspiracy in maintaining the groundless actions after the judgment of dismissal of petitioner's case by the Federal court on December 1, 1949, conflicts with the decision of this Court in *Lawlor* v. *National Screen Service Corporation,* 349 U.S. 322, and presents a Federal question necessitating the issuance of the writ sought."

Petitioner invokes the law stated on page 355, 2d edition, of "Supreme Court Practice" by Stern and Gressman, to wit:

> "Questions not presented in the original petitions are not foreclosed upon rehearing, even though the statutory period for filing a petition for certiorari may have expired in the meantime. *White* v. *Texas,* 309 U.S. 631, 310 U.S. 530. The Court's jurisdiction over the case is established by a timely petition for certiorari. The issues that may then or thereafter

be considered depend solely upon the Court's discretion."

and also from page 354 of said "Supreme Court Practice":

"Another intervening circumstance may be a new and controlling Supreme Court decision."

See also the last paragraph on page 89-90 of said "Supreme Court Practice"; also surprise cases cited in footnotes 12 and 13 on said page 89.

2. The question continues to be one of large practical importance for the reason that the Supreme Court of Missouri considered the motion sufficiently to warrant a second opinion on October 11, 1955 (Vol. III, 176-179), which held that there was no real federal question (Vol. III, 178) in the case. This Court in the Lawlor case decided the identical federal question herein involved. That is, it decided a judgment of a federal court, though *res judicata* as to overt acts done prior thereto pursuant to a conspiracy, while the Supreme Court of Missouri held that the judgment of the federal court of December 1, 1949, was *res judicata* against petitioner's right to recover for loss resulting from overt acts done pursuant to same original conspiracy after said judgment. This motion should be determined in accordance with the principle stated in *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U.S. 249:

"Whenever the judicial power is invoked to review a judgment of a state court, the ultimate constitutional purpose is the protection, by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States."

The decision of the state court authorizes respondent to keep all the groundless cases pending until time shall be

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no more, and thereby denies the petitioner said constitutional protection of the supreme law.

And thus and thereby deprived this petitioner of the property devised and bequeathed to her by her late husband, in direct violation of the command of the Federal Constitution set forth in said quoted paragraph (35) (Vol. III, p. 123). Thus raising the Federal questions as to this new case, as declared in *Lawlor* v. *National Screen Service Corporation,* which could not have been theretofore raised—and hence were raised at the very first opportunity.

This Court may wonder why this petitioner has unsuccessfully appealed to this Court on six occasions with reference to this matter. But it was the pendency of the groundless actions, which had been settled and compromised as of January 1, 1927, instituted by respondent with full knowledge of the fact that they were groundless.

In its ruling the state court denied to petitioner the protection of that supreme law contrary to the command of Article VI of the federal Constitution that

> ". . . the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Said provision binds this court as fully as it binds the state judges, notwithstanding there is no such express command to federal judges.

As to this case, Section II of Article III provides:

> ". . . the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

The Congress has made no exception of the appellate jurisdiction of this Court as applied to this case. It is most respectfully submitted that it would not be an exercise of judicial discretion by this court to deny this petition and thereby permit respondent to oppress petitioner by keeping the groundless actions forever pending.

Can this Court permit that condition to continue to exist, and yet feel that it is discharging its constitutional duty, in view of the fact that, as to the question here presented, petitioner's petition states a cause of action—and the state court's finding that it does not, is not a nonfederal ground adequate to support its decision?

> "If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."
>
> *Marbury* v. *Madison,* 1 Cranch. 137, l. c. 177, 178.

> " * a power definitely assigned by the Constitution to one department can neither be surrendered nor delegated by that department nor vested by *statute* in another department or agency."
>
> *Williams* v. *United States,* 289 U.S. 553-581, l. c. 581.

Title 28 U.S.C.A., Section 1257 (3), could not eliminate the words

> "with such exceptions * * as the Congress shall make"

from the Constitution and delegate that power to this Court.

Rule 19, 1 (a), of this Court, in itself, authorizes the issuance of this writ.

Conclusion

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to Division No. 1 of the Missouri Supreme Court, which Division refused to transfer the case to the Court en banc,

Respectfully submitted,

MARTIN J. O'DONNELL,
Counsel for Petitioner.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 (2) of the rules of this Court.

MARTIN J. O'DONNELL,
Counsel for Petitioner.

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